No. 71-573

In the Supreme Court of the United States

OCTOBER TERM, 1971

MELVIN LAIRD, SECRETARY OF DEFENSE, ROBERT SEAMANS, JR., SECRETARY OF THE AIR FORCE, AND UNITED STATES OF AMERICA, PETITIONERS

v.

JIM NICK NELMS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONERS

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 442 F. 2d 1163. The order of the district court (Pet. App. B) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1971. On August 18, 1971, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including October 25, 1971. The

petition was filed on October 22, 1971, and was granted on January 17, 1972 (App. 47). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Tort Claims Act subjects the United States to liability without fault on the basis of state law imposing absolute liability for ultra-hazardous activities.

2. Whether a claim under the Federal Tort Claims Act for damages resulting from sonic booms created by Air Force aircraft on an authorized training mission is barred by the discretionary function exception to the Act.

STATUTES AND REGULATIONS INVOLVED

The Federal Tort Claims Act provides:

28 U.S.C. 1346(b):

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claim-

ant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2680(a):

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Air Force Regulation 55-34 is set forth at Pet. App. C.

STATEMENT

This action was brought against the United States[1] under the Federal Tort Claims Act (28 U.S.C. 1346 (b), 2671, *et seq.*) to recover damages allegedly caused to the respondents' home by sonic booms created by United States Air Force aircraft. The district court granted the government's motion for summary judgment on the ground that the claims were barred by the discretionary function exception to the Act (28 U.S.C. 2680(a)). The court of appeals reversed, holding that the discretionary function ex-

[1] The suit was originally brought against Melvin Laird, the Secretary of Defense, and Robert Seamans, Jr., the Secretary of the Air Force. The district court permitted the plaintiffs to amend the complaint to add the United States as a party defendant (App. 13, 14).

ception was inapplicable and that under the Act the United States could be subjected to absolute liability without fault in circumstances where state law imposed such liability for ultrahazardous activities.

1. Respondents' complaint alleged (App. 4, 13) that sonic booms "on several occasions" had caused masonry cracks and other damage to their home and storage unit, located in Nashville, North Carolina, that would necessitate complete rebuilding of both structures at a cost of $16,000. They identified one sonic boom occurring at approximately 2:30 P.M. on November 14, 1968, as having caused the "worst" damage. Their complaint was supported by affidavits from various persons who allegedly heard the sonic boom of November 14, as well as booms on prior occasions, and who stated either that they saw damage to the Nelms' home take place on November 14 or that the condition of the house was good prior to that date and markedly worse thereafter (App. 22–42).

The government filed a motion for summary judgment and supporting affidavits. The affidavits (App. 9–12) indicated that a military aircraft had flown at supersonic speeds in the Nashville, North Carolina, area at approximately 2:30 p.m. on November 14, 1968. The aircraft, an Air Force SR–71, was attached to the 9th Strategic Reconnaissance Wing of the Strategic Air Command, stationed at Beale Air Force Base, California. The Wing's responsibilities included making periodic high level supersonic training flights (denominated as combat crew training missions), in accordance with predetermined flight plans.

The Commander in Chief of the Strategic Air Command, General Bruce K. Holloway, stated (App. 9) that he had command authority of all units, agencies, and installations of the Air Force assigned or allocated to the Strategic Air Command, including the Ninth Strategic Reconnaissance Wing. In operational matters pertaining to the Strategic Air Command, the line of command is from the President to the Secretary of the Defense, and through the Joint Chiefs of Staff to General Holloway. His command responsibility encompassed the organization, training and equipping of its strategic forces, including supersonic aircraft.

According to General Holloway, constant training of personnel and testing of equipment are necessary to insure the capability of his command to perform its mission, and training flights over land areas of the United States in supersonic aircraft—which may create sonic booms—are essential to the security of the nation. He indicated that he had "directed the operational training of air crews by supersonic flights in the SR–71 aircraft," and that the flight to the Nashville area on November 14, 1968, "was authorized by and conducted pursuant to such direction" (App. 9). Supersonic training missions were to be flown, however, "under controls designed to minimize disturbances on the ground, and these controls include prescribed altitudes, routes, and speeds" (*ibid.*).

The commander of the Ninth Strategic Reconnaissance Wing stated (App. 12) that the November 14 flight was a combat crew training mission undertaken

pursuant to "the direction of the Commander in Chief, Strategic Air Command." He also stated, and the plane's pilot confirmed (App. 11), that the flight was on course as prescribed by the mission flight plan during the passage over the Nashville area.

None of the statements contained in the affidavits submitted by the government was controverted by the respondents.

2. The district court held that respondents' claims were barred by the discretionary function exception to the Federal Tort Claims Act, in 28 U.S.C. 2680(a). Accordingly, it granted the government's motion for summary judgment (Pet. App. B).

The court of appeals reversed (Pet. App. A). It held that the discretionary function exception to the Tort Claims Act was inapplicable on the ground that while the flight itself was discretionary, an Air Force regulation [2] "placed the government employees under a mandate that gave them no discretion with regard to the protection they were required to afford the public" (Pet. App. A, p. 22). The regulation, the court stated, directed that those planning the supersonic flights take precautions to assure "maximum protection for civilian communities," and specified that "When a civilian area has been affected by Air Force aircraft, the Air Force must accept responsibility for restitution and payment of just claims" (Pet. App. C, pp. 32, 35–36). In the court's view, these provisions

[2] The court referred to Air Force Regulation 55–34 (Pet. App. C), which establishes standards and procedures for supersonic flights.

"require[d] the Air Force to accept responsibility for restitution without qualification and pay all just claims" (Pet. App. A, p. 21).

With respect to the merits of respondents' claim, the court noted that respondents were relying on "the doctrine of strict liability" since they could not show "negligence either in the planning or operation of the flight" (Pet. App. A, p. 24). On the authority of its prior decision in *United States* v. *Praylou*, 208 F. 2d 291 (C.A. 4), certiorari denied, 347 U.S. 934, the court held that the government could be subjected to absolute liability under the Act where, as here, state law imposed such liability because the activity undertaken (in this case, the supersonic flights) was ultrahazardous. It remanded the case to the district court for trial to determine causation and the extent of the damage.[3]

SUMMARY OF ARGUMENT

I

"[N]o action lies against the United States unless the legislature has authorized it." *Dalehite* v. *United States*, 345 U.S. 15, 30. The Federal Tort Claims Act authorizes suits against the United States only for injuries "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employ-

[3] The court directed that on remand respondents be permitted to amend their complaint to plead more specifically that they were entitled by reason of the flights to just compensation under the Fifth Amendment (Pet. App. A, p. 28).

ment * * *" (28 U.S.C. 1346(b)). As this Court held in *Dalehite,* the Act does not permit suits based on the theory of absolute liability without fault.

The Act in terms limits the government's responsibility to "negligent or wrongful" conduct. Absolute liability without fault is imposed not because a negligent or wrongful act is committed, but because the activity involved is one which, despite the exercise of all due care, poses a likelihood of injury. Liability on this basis is imposed "apart from either wrongful intent or negligence." Prosser, *Torts* Sec. 74, p. 510 (3d ed. 1964). There is nothing negligent or wrongful about merely engaging in an activity, even an extra-hazardous one. Moreover, strict liability is imposed without regard to the fact that the employee actually performing the activity exercised due care. In that circumstance there would be no negligent or wrongful conduct "of any employee," as the Act requires.

The legislative history of the Act indicates that Congress did not intend to subject the government to absolute liability without fault. The major reason for the Act was to provide a satisfactory remedy for the ordinary, common-law type of tort, like a negligently-caused automobile accident. It was not intended to cover torts committed by the government as such. The term "wrongful" was used in the statute to reach deliberate trespass cases, and does not adopt the strict liability concept. The exception from the Act's coverage of various non-negligent torts also shows that it does not permit recovery without a showing of fault.

This is the conclusion reached in *Dalehite*. The Court expressly held that the Act "require[s] some brand of misfeasance or nonfeasance, and so could not extend to liability without fault" (346 U.S. at 45). That ruling has not been disturbed by the Congress or by the Court's later decisions under the Act.

II

The Act does not authorize suit for "Any claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused" (28 U.S.C. 2680(a)). Congress intended that a tort suit should not be used to test the propriety of a discretionary administrative act. The actions in the present case are discretionary, and therefore are excepted from suit.

In *Dalehite* the Court explained that the discretionary function exception applies to official decisions "responsibly made at a planning rather than operational level" (346 U.S. at 42). "Where there is room for policy judgment and decision there is discretion" (*id.* at 36). The acts of subordinates in following directions also are excepted, since those acts are merely the culmination of the decisions at the discretionary level. This reasoning applies to all the governmental decisions in the present case: the general authorization of supersonic training flights and the authorization and planning of the specific flight involved here were responsibly made at a planning stage, while the flight

itself was made in strict accordance with official instructions. The Air Force Regulation upon which the court of appeals relied neither changes the discretionary character of the decisions involved in making the flight nor authorizes suit against the United States for damages resulting therefrom.

ARGUMENT

I

THE UNITED STATES MAY NOT BE SUBJECTED UNDER THE FEDERAL TORT CLAIMS ACT TO LIABILITY WITHOUT FAULT ON THE BASIS OF STATE LAW IMPOSING ABSOLUTE LIABILITY FOR ULTRAHAZARDOUS ACTIVITIES

Consideration of questions concerning governmental liability for injuries arising out of its undertakings begins with "the accepted jurisprudential principle that no action lies against the United States unless the legislature has authorized it." *Dalehite* v. *United States*, 346 U.S. 15, 30. See also *Feres* v. *United States*, 340 U.S. 135, 139; *United States* v. *Eckford*, 6 Wall. 484; *Reeside* v. *Walker*, 11 How. 271, 289–291; *United States* v. *McLemore*, 4 How. 286. In the Federal Tort Claims Act, Congress has made the government liable for injuries caused by the "negligent or wrongful" acts of its employees. The court below held that by this consent to be sued the United States is subject to absolute liability without fault when it engages in an extrahazardous activity for which "state law imposes strict liability on private persons" (Pet. App. A, p. 25). In our view, this Court in *Dalehite* rejected the proposition that an absolute liability theory is available as a basis for recovery

under the Act. The language of the Act and its legislative history support this conclusion, as we shall show before turning to *Dalehite*.

1. The Federal Tort Claims Act authorizes suits against the United States only for injuries "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment" to the same extent that "a private person, would be liable" under "the law of the place where the act or omission occurred." 28 U.S.C. 1346(b), pp. 2–3, *supra*. Thus the Act in terms requires, before the United States can be held liable, that its employee acted negligently or wrongfully.

Absolute liability without fault, however, is imposed not because an employee has committed a "negligent or wrongful act," but because the activity involved is one which, despite the exercise of all due care, poses a likelihood of injury. See Prosser, *Torts* Secs. 74, 77 (3d ed. 1964); *Restatement of Torts* (1934), Secs. 519–520.[4] The principle reflects the policy judgment

[4] Strict liability for persons engaging in extrahazardous activities stems from the English case of *Fletcher* v. *Rylands*, L.R. 1 Ex. 265 (1866), affirmed, L.R. 3 H.L. 330 (1868). In that case water from the defendant's reservoir burst through an ancient mineshaft and flooded the plaintiff's adjacent mine. Although the defendant's contractor had been negligent in constructing the reservoir, this negligence was not imputed to the defendant. Instead, the Court of Exchequer imposed liability on the ground "that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape." L.R. 1 Ex. at 279. On appeal, the opinions in the House of Lords limited use of the rule to situations involving a "non-natural" use of land.

that a person engaging in an ultrahazardous activity should bear the risk of all harm caused by the activity, even though it is carried on with all possible care. Liability results from the decision to undertake the activity, not the way in which it is conducted.

The concept of strict liability without fault for engaging in an extrahazardous activity is thus quite different from the type of conduct for which the Tort Act imposes liability. Strict liability is imposed "apart from either wrongful intent or negligence." Prosser, *supra,* Sec. 74, p. 510. But "wrongful or negligent" conduct is the necessary requisite for recovery under the Act. There is nothing negligent or wrongful about merely engaging in an activity, even an extrahazardous one, since that by itself involves no "social fault." *Restatement of Torts* 2d (1965), Sec. 282, p. 11.

Our view that the Act does not permit recovery based on a theory of absolute liability is supported by the fact that the government is made responsible only for the negligent and wrongful acts "of any employee of the Government."[5] Strict liability for engaging in an extrahazardous activity is placed directly on the person or entity who decides to go forward with it,

[5] The need that there be some negligent or wrongful conduct by a goverment employee is emphasized by 28 U.S.C. 2676, which declares that "The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the *employee of the goverment whose act or omission gave rise to the claim*" (emphasis added). See also 28 U.S.C. 2680(a), discussed at pp. 15–16, *infra*, which provides that the Act does not authorize recovery for an employee's acts in executing a statute or regulation so long as he "exercis[es] due care."

even though the employee who actually performs the activity exercises due care. In that situation, however, there would be no negligent or wrongful act of an *employee,* as the statute requires.[6]

2. The legislative history of the Act also indicates that Congress did not intend to subject the United States to strict liability without fault for its ultrahazardous activities, but only to liability for the negligent or wrongful conduct of its employees.[7] Almost thirty years elapsed between 1919, when the first bill subjecting the United States to tort liability was introduced (H.R. 14737, 65th Cong., 3d Sess.), and the passage of the Tort Act in 1946. The major reason for the numerous bills dealing with the matter during this time was that there was "no satisfactory remedy * * * for the wrongs of Government officers or employees,

[6] Unless he has been negligent, an employee is not liable for injuries resulting from his performing an ultrahazardous activity on behalf of a public body. He has committed no wrongful act if he has acted with due care. See *Restatement of Torts* (1938) Sec. 521.

The specific preservation in Section 424(b) of the original Tort Claims Act, 60 Stat. 847, of all other statutes authorizing disposition of claims not based upon "any negligent or wrongful act or omission of an employee of the Government while acting within the scope of his office or employment," evidences the intention of Congress to exclude from the scope of the Tort Act all claims not predicated on fault or misconduct of an employee. The purpose of this section was to continue in effect all legislation permitting the adjustment of claims not cognizable under the new Act, but to repeal all statutes covering the same ground as the new Act. See S. Rep. No. 1196, 77th Cong., 2d Sess., p. 8; S. Rep. No. 1400, 79th Cong., 2d Sess., p. 34.

[7] Because the legislative history of the Act is unusually complicated, we have set it forth in the Appendix, *infra*, pp. 33–42, which we believe may be helpful to the Court.

the ordinary 'common law' type of tort, such as a personal injury or property damage caused by the negligent operation of an automobile." Hearings before the House Committee on the Judiciary on H.R. 5373 and H.R. 6463, 77th Cong., 2d Sess. (January 29, 1942), p. 39. See also *id.* at pp. 24, 28, 37, 66; Hearings before a Subcommittee of the Senate Committee on the Judiciary on S. 2690, 76th Cong., 3d Sess. (March 6 and 11, 1940), p. 7; H. Rep. No. 2245, 77th Cong., 2d Sess., p. 10; H. Rep. No. 1400, 79th Cong., 2d Sess., p. 31. The focus was on providing a remedy for wrongs done by a particular individual, as a result of his carelessness; coverage was intended only for situations where "the Government as such did not commit the tort, but it was done through its agent or servant." Hearings before a Subcommittee of the Senate Committee on the Judiciary on S. 2690, *supra,* at p. 44.

While the statute permits recovery for "wrongful" as well as negligent conduct, "wrongful" as there use was not intended to cover strict liability without fault. It was included to reach a small class of individual torts—chiefly, the deliberate trespass to property—which, though non-negligent, involve essentially illegal conduct by an employee for which the government should be responsible. Congress contemplated that the category of "negligence" would cover the great bulk of the cases, and that the actions in the "wrongful" class would be few. See statement of Alexander Holtzoff, Department of Justice representative, at the Hearings before a Subcommittee of the Senate

Judiciary Committee on S. 2690, *supra*, at p. 43; H. Rep. No. 2245, 77th Cong., 2d Sess., p. 11. Written analyses of various versions and revisions of the bills in the 77th Congress, prepared for the internal use of the committees, also indicate the narrow content given to the term "wrongful." Discussion of Proposed Revision of S. 2221, Prepared for the Use of the Senate Committee on the Judiciary, 77th Cong., 2d Sess. (March 23, 1942), pp. 2, 7; Discussion of Differences Between H.R. 6463 and S. 2221 as passed by the Senate on March 30, 1942, 77th Cong., 2d Sess. (April 6, 1942), pp. 3, 7.

The general exclusion from the Act of claims "based upon any act or omission of an employee * * *, exercising due care, in the execution of a statute or regulation" (28 U.S.C. 2680(a)) confirms that there can be no recovery without a showing of fault. When this provision was first introduced, it was explained that the cases it covered "would probably have been exempted" from the Act "by judicial construction," on the ground that there could be no "negligent or wrongful" act if the employee exercised due care; even so, the exception was inserted to preclude "any possibility" that "the act would be construed to authorize suit for damages against the Government growing out of a legally authorized activity, such as a flood-control or irrigation project, where no wrongful act or omission on the part of any Government agent is shown, and the only ground for suit is the contention that the same conduct by a private individual would be tortious * * *." Hearings before the

House Committee on the Judiciary on H.R. 5373 and 6463, *supra*, at p. 65. See also *id.* at 28, 29, 33, 44; S. Rep. No. 1196, 77th Cong., 2d Sess., p. 7; H. Rep. No. 2245, 77th Cong., 2d Sess., p. 10; H. Rep. No. 1287, 79th Cong., 1st Sess., p. 5.[8] The conduct described in the foregoing quotation, for which the Act did not intend to authorize suit, is a typical example of liability without fault.

The legislative history of the proposal (see S. 2221, 77th Cong., 2d Sess.) that non-negligent nuisances be expressly excluded from the Act similarly reflects Congressional intention not to subject the United States to liability without fault. The Senate Committee thought that since other non-negligent torts (such as assault, battery, false arrest, and so forth see 28 U.S.C. 2680(h)) were to be expressly excluded, non-negligent nuisances should be also. See Discussion of Proposed Revision of S. 2221, *supra,* p. 8. The House Judiciary Committee rejected the proposal as unnecessary, explaining that the general exception of Section 2680(a) would automatically exclude non-negligent authorized acts "which might constitute a nuisance if done by a private person." H. Rep. No. 2245, 77th Cong., 2d Sess., p. 12.[9]

[8] The reference to flood control and irrigation projects would probably include a reservoir like the one in *Fletcher* v. *Rylands*, *supra* n. 4. The exception in Section 2680(a) stating that the government is not responsible for damages unless there is an absence of due care—*i.e.*, negligence—further shows that Congress rejected the strict liability standard employed in *Fletcher* v. *Rylands*.

[9] To deny respondents recovery in the circumstances here would not place them in any different position than other per-

3. In *Dalehite* v. *United States, supra,* this Court expressly rejected the argument that the Tort Claims Act subjected the United States to strict liability without fault premised on state law imposing such liability for ultrahazardous activities.[10] The plaintiffs in that case asserted claims against the United States for damages arising from the catastrophic explosion at Texas City, Texas, of fertilizer manufactured and

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sons injured by governmental activities who cannot sue under the Act. Congress intended that claims which the Act did not cover should be handled in the same fashion as before, by private bills. See Hearings before a Subcommittee of the Senate Judiciary Committee on S. 2690, *supra*, at p. 34.

The Senate version of what finally became the Tort Act contained a total ban on the introduction of private bills. See S. 2177, June 11, 1946, Sec. 121. The House amended the bill, however, to prohibit only private bills authorizing or directing "the payment of money for property damages, for personal injuries or death for which suit may be instituted under the Federal Tort Claims Act * * *." Legislative Reorganization Act of 1946, Sec. 131, now 2 U.S.C. 190*g*. The Joint Committee accepted the House position, thus agreeing that "All other private claims [not covered by the Act] can be taken care of by a private bill or resolution in the same manner in which they have heretofore been handled." Legislative Reorganization Act of 1946, Committee Print, Joint Committee on the Organization of Congress (July 22, 1946), 79th Cong., 2d Sess., p. 25.

[10] Whether the Tort Act sanctions recovery against the government on a strict liability theory was an important issue before this Court in the *Dalehite* case. In the government's brief, for example, one of the questions presented was whether the Act "authorizes actions against the United States based upon * * * [a]uthorized government activities, where no negligent or wrongful conduct of an employee can be shown, but for which a private person would be held absolutely liable regardless of fault" (Brief for the United States in *Dalehite* v. *United States*, No. 308, O.T., 1952, at p. 4), and that question was discussed thoroughly (*id.* at pp. 231–246).

transported by the government. The Court relied on the language of Section 1346(b) limiting liability to injuries resulting from a "negligent or wrongful act or omission" as showing that the Act did not encompass claims based on strict liability. It explained (346 U.S. at 44–45):

> * * *[T]here is yet to be disposed of some slight residue of theory of absolute liability without fault. This is reflected both in the District Court's finding that the FGAN [fertilizer] constituted a nuisance, and in the contention of petitioners here. We agree with the six judges of the Court of Appeals, 197 F. 2d 771, 776, 781, 786, that the Act does not extend to such situations, though of course well known in tort law generally. It is to be invoked only on a "negligent or wrongful act or omission" of an employee. Absolute liability, of course, arises irrespective of how the tortfeasor conducts himself; it is imposed automatically when any damages are sustained as a result of the decision to engage in the dangerous activity. The degree of care used in performing the activity is irrelevant to the application of that doctrine. But the statute requires a negligent act. So it is our judgment that liability does not arise by virtue either of United States ownership of an "inherently dangerous commodity" or property, or of engaging in an "extrahazardous" activity. *United States* v. *Hull*, 195 F. 2d 64, 67.

The Court also rejected the contention that acts for which state law imposed liability without fault were

"wrongful" within the meaning of the Act (346 U.S. at 45):

> Petitioners rely on the word "wrongful" though as showing that something in addition to negligence is covered. This argument, as we have pointed out, does not override the fact that the Act does require some brand of misfeasance or nonfeasance, and so could not extend to liability without fault; in addition, the legislative history of the word indicates clearly that it was not added to the jurisdictional grant with any overtones of the absolute liability theory. Rather, Committee discussion indicates that it had a much narrower inspiration: "trespasses" which might not be considered strictly negligent. Hearings before a Subcommittee of the Senate Committee on the Judiciary on S. 2690, 76th Cong., 3d Sess. 43–44. Had an absolute liability theory been intended to have been injected into the Act, much more suitable models could have been found, see *e.g.*, the Suits in Admiralty Act, 41 Stat. 525, 46 U.S.C. §§ 742–743, in regard to maintenance and cure. * * *

While the dissenting opinion in *Dalehite* (346 U.S. at 47–60) disagreed with all other aspects of the majority decision, it did not take issue with the ruling that absolute liability is not a basis for a Tort Act recovery.[11] Nor has that ruling been disturbed by the

[11] *Dalehite* disposes of the two grounds upon which the Fourth Circuit relied in its prior decision in *United States* v. *Praylou*, 208 F. 2d 291 (C.A. 4), certiorari denied, 347 U.S. 934, which it followed in the present case (Pet. App. A, p. 25).

(1) In *Praylou*, the court distinguished "between possession of a dangerous property, the point argued in *Dalehite*, and the operation of a dangerous instrument" that was involved there

Congress [12] or by this Court's later decisions under the

(208 F. 2d 295). *Dalehite* stated, however, that liability under the Tort Act cannot be imposed "by virtue either of" the government's ownership of an inherently dangerous commodity or property "or of engaging in" an extrahazardous activity (346 U.S. at 45).

(2) The court in *Praylou* also concluded that the Tort Act permits recovery on an absolute liability theory because "the effect of the [state law imposing absolute liability] * * * is to make the infliction of injury or damages by the operation of an airplane [the extra-hazardous instrument involved] of itself a *wrongful act* giving rise to liability" (208 F. 2d at 293; emphasis supplied). But in *Dalehite* the Court rejected the theory that the word "wrongful" in the Tort Act covers absolute liability (346 U.S. at 45).

The Court's denial of certiorari in *Praylou* may have reflected its view that the basis of liability in that case was in fact negligence. In their brief in opposition in *Praylou*, the respondents asserted that "[n]egligence was an issue" in the case, under the doctrine of *res ipsa loquitur* (Brief in Opposition, *United States* v. *Praylou*, No. 568, O.T. 1953, pp. 2, 6–7). Contrary to respondent's assertion in their brief in opposition (pp. 4–5), the instant case is not like *Praylou* and different from *Dalehite* with respect to the way in which state law imposes absolute liability. While "[n]o local statutes were involved" in *Dalehite* (Resp. Brief in Opp., p. 4), the same is true in this case.

[12] Following this Court's decision in *Dalehite*, various private bills were introduced to obtain legislative relief for those who sustained losses as a consequence of the Texas City disaster. While these efforts culminated in legislation allowing recovery (Act of August 12, 1955, 69 Stat. 707), the Tort Claims Act was not amended. As Mr. Justice Reed pointed out in his dissenting opinion in *Indian Towing Co.* v. *United States*, 350 U.S. 61, 74. "Throughout the reports, discussion and enactment of the relief act, there was no effort to modify the Tort Claims Act so as to change the law, in any respect, as interpreted by this Court in *Feres* and *Dalehite*." See, *e.g.*, H. Rep. No. 1386, 83d Cong., 2d Sess., at p. 5; S. Rep. No. 684, 84th Cong., 1st Sess., at p. 8.

Act.[13]

Every other court of appeals that has considered this issue has ruled that the Act does not sanction recovery based on the doctrine of strict liability. See, *e.g.*, *United States* v. *Hull*, 195 F. 2d 64, 67 (C.A. 1); *Heale* v. *United States*, 207 F. 2d 414 (C.A. 3); *Emelwon, Inc.* v. *United States*, 391 F .2d 9, 10 (C.A. 5), certiorari denied, 393 U.S. 841; *United States* v. *Taylor*, 236 F. 2d 649, 652–653 (C.A. 6), petition for a writ of certiorari dismissed, 355 U.S. 801; *Wright* v. *United States*, 404 F. 2d 244, 246 (C.A. 7); *Bartholomae Corp.* v. *United States*, 253 F. 2d 716, 718 (C.A. 9); *United States* v. *Page*, 350 F. 2d 28, 33 (C.A. 10), certiorari denied, 382 U.S. 979.

The decision below would result in the United States in effect becoming an "insurer" as to all losses occasioned by its ultrahazardous activities. In view of the vast number of governmental activities, many of which doubtless can be termed "ultrahazardous," the government's liability could be enormous. Congress

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[13] Those decisions, while not directly involving the question whether the doctrine of strict liability applies under the Act, have continued to emphasize that the Act permits recovery against the government only for *negligent* conduct. *E.g.*, *Indian Towing Company* v. *United States*, *supra*, 350 U.S. at 68–69; *United States* v. *Muniz*, 374 U.S. 150, 165. In *Hatahley* v. *United States*, 351 U.S. 173, 181, the Court reiterated that the statute's use of the word "wrongful" was intended merely "to include [recovery for] situations * * * involving 'trespasses' which might not be considered strictly negligent." Neither *Indian Towing* nor the later decision in *Rayonier, Inc.* v. *United States*, 352 U.S. 315, in which the Court rejected the notion that the Act excluded conduct performed in a uniquely governmental capacity, involved or discussed the strict liability doctrine or its place under the Act.

should not be deemed to have imposed this responsibility upon the United States without explicitly saying so. Yet there is no indication in the Act or its history that the government was to be strictly liable without fault; indeed, without exception the relevant provisions and comments point the other way. And this Court's declaration in *Dalehite* is unmistakeable—the Act does not "extend to liability without fault" (346 U.S. at 45).

II

THE TORT CLAIMS ACT EXCEPTION FOR CLAIMS RESULTING FROM THE PERFORMANCE OF A DISCRETIONARY FUNCTION OR DUTY PRECLUDES IMPOSING LIABILITY ON THE UNITED STATES IN THIS CASE

The United States is not liable under the Tort Claims Act not only because the Act does not cover liability without fault, but also because of the Act's discretionary function exception.

1. Section 2680(a) excepts from the Act's authorization to sue the government "Any claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

In discussing a similar provision in a bill before the 77th Congress, a Department of Justice representative explained that "[i]t is neither desirable nor intended that the constitutionality of legislation, the legality of regulations, or the propriety of a discretionary administrative act should be tested through

the medium of a damage suit for tort." Hearings before the House Committee on the Judiciary on H.R. 5373 and 6463, *supra,* at p. 28. These views were substantially incorporated in the Committee reports in that Congress (S. Rep. No. 1196, 77th Cong., 2d Sess., p. 7; H. Rep. No. 2245, 77th Cong., 2d Sess., at p. 10), and were carried over into the pertinent House Report in the 79th Congress which enacted the statute in 1946 (H. Rep. No. 1287, 79th Cong., 1st Sess., at pp. 5–6).

The statutory scheme as a whole indicates, we submit, that Congress intended the exception to apply where the employee whose act or omission is questioned has the power of choice and a substantial factor influencing his selection of a particular course of conduct is a governmental interest. The actions in this case fit this description, and thus are not actionable under the statute.

2. The Court in *Dalehite, supra,* in rejecting the contention that the government was liable for alleged negligence by its officials in connection with the Texas City fertilizer explosion, held that certain acts charged as negligence were within the discretionary function exception.[14] Five different levels of activity were involved: (1) the cabinet-level decision to institute the fertilizer export program (346 U.S. at 37). (2) The decision whether the Army Ordinance Corps

[14] Whether the discretionary function exception applied to these acts was the chief concern of this Court's decision in *Dalehite* (see 346 U.S. at 26–42) and was dealt with extensively in the briefs before the Court (see, *e.g.*, Brief for the United States, *Dalehite* v. *United States*, No. 308, O.T., 1952, at pp. 178–229).

should have conducted further experimentation into the combustibility of the fertilizer and the possibility of explosion under conditions likely to be encountered in shipping (*id.* at 37–38). (3) The formulation of the basic manufacturing plan, drafted by employees in the office of the Field Director of Ammunition Plants (*id.* at 38). (4) Four specific acts of asserted negligence in the manufacturing process: (a) the decision of Army plant officials to bag the fertilizer at a certain temperature; (b) the decision of transportation officials concerning how to label the bags of fertilizer; (c) the decision to coat the fertilizer with a compound to avoid water absorption; and (d) the specification that the bagging material consist of moisture-proof paper or burlap bags (*id.* at 39–42). (5) The failure of the Coast Guard and other agencies to regulate the storage and loading of the fertilizer in a safe manner (*id.* at 43).

The Court concluded that the exception applied to all these actions because the official decisions with respect thereto "were all responsibly made at a planning rather than operational level and involved considerations more or less important to the practicability of the Government's fertilizer program" (*id.* at 42). While the Court found it "unnecessary to define, apart from this case, precisely where discretion ends," since the exception applied to all the acts in issue, it elaborated as follows (346 U.S. at 35–36):

> It is enough to hold, as we do, that the "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act in-

> cludes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. If it were not so, the protection of § 2680(a) would fail at the time it would be needed, that is, when a subordinate performs or fails to perform a causal step, each action or nonaction being directed by the superior, exercising, perhaps abusing, discretion.[15]

The Court's reasoning is equally applicable to the governmental decisions involved here. While respondents' complaint does not allege specific acts of negligence, there are only three levels at which official misfeasance could have occurred—the general authorization of supersonic combat crew training missions over land areas, the authorization and planning of the specific flight on November 14 over the Nashville area, and the carrying out of that flight. The first was ordered by the Commander-in-Chief of the Strategic Air Command, the second by the Wing commander.

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[15] Congress did not modify Section 2680(a) when it subsequently passed the relief act for the Texas City disaster claimants, despite the fact that the focus during legislative consideration of the matter, and of this Court's ruling in *Dalehite*, "was restricted solely to the discretionary function exception to the Act" (*Indian Towing Co.* v. *United States*, *supra*, 350 U.S. at 74, Mr. Justice Reed, dissenting).

There can be no question that both of these decisions called for the exercise of judgment involving an important governmental objective and considerations which were special to the nation as a whole and its defense program. Since supersonic flights over land areas are essential to the national security (App. 9–10), and since virtually no area of this country is totally unpopulated, the question where to route a supersonic flight necessarily requires "room for policy judgment and decision" (346 U.S. ate 36). The determination over what areas such flights should be flown obviously involved high-level "executives or administrators in establishing plans, specifications or schedules of operations" (*id.* at 35–36); it entailed "consideration of a vast spectrum of factors, including some which touched directly the feasibility of the * * * program" (*id.* at 40). Under the test of *Dalehite,* their decisions "were all responsibly made at a planning rather than operational level" (*id.* at 42).

Though the third level, the flight itself, might be deemed "operational," the pilot's affidavit (App. 11) states that the flight "was made in strict accordance with directions given to me regarding route, speed and altitude," so that the acts at this level, like some of the decisions in *Dalehite,* were "of subordinates in carrying out the operations of government in accordance with official directions" and thus "cannot be actionable" (346 U.S. at 36). In short, here, just as in *Dalehite,* "[a]n analysis of Section 2680(a) * * * emphasizes the congressional purpose to except the

acts here charged as negligence from the [Act's] authorization to sue" (*id.* at 32).[16]

In *Maynard* v. *United States*, 430 F. 2d 1264, the Court of Appeals for the Ninth Circuit so concluded on facts almost on all fours with the present case. That was a Tort Act suit for injuries sustained as a result of a sonic boom created by an Air Force SR–71 on a supersonic training flight. The district court granted a government motion for summary judgment, based on Section 2680(a) and affidavits like those here, showing that the boom resulted from a duly authorized and properly conducted flight. The court of appeals affirmed *per curiam* on the authority of *Dalehite*. Several district courts also have held that the discretionary function exception applies in cases involving government-created sonic booms.[17]

[16] The court of appeals concluded that *Dalehite* did not apply here because "The unforeseeability of harm in the Texas City explosion contrasted with the likelihood of harm from sonic booms raises a distinction so significant that *Dalehite* cannot be be considered to control the case before us" (Pet. App. A, pp. 23–24). But *Dalehite* did not rely on the foreseeability of harm. See *Ward* v. *United States*, 331 F. Supp. 368, 373–374 (W.D. Pa.), appeal pending, C.A. 3, No. 71–2041. The determinative issue for the Court was whether "there is room for policy judgment and decision", in which case "there is discretion" (346 U.S. at 36). That the decision to undertake the supersonic flight in the instant case involved a known risk underscores the fact that competing interests were presented and taken into account, which shows that this was a discretionary function exempted from the Act by Section 2680(a).

[17] *E. g.*, *Ward* v. *United States*, *supra*, (explicitly refusing to follow the decision of the court below); *Huslander* v. *United States*, 234 F. Supp. 1004 (W.D. N.Y.); *Schwartz* v. *United States*, 38 F.R.D. 164 (D. N.D.); *McMurray* v. *United States*, 286 F. Supp. 701 (W.D. Mo.).

In a variety of other situations—such as irrigation and con-

The cases holding the exception inapplicable define the line between discretionary and non-discretionary acts. In *Indian Towing Co.* v. *United States,* 350 U.S. 61, for example, the Court held that the government was liable for negligence in failing to keep a lighthouse in good working order. It emphasized, however, that the acts claimed as negligence occurred at the "'operational level' of governmental activity," and did not involve decisions of a discretionary nature, such as whether or not even to "undertake the lighthouse service" (350 U.S. at 64, 69).[18] Compare also

servation projects, housing redevelopment and highway construction—the courts of appeals have held that decisions similar to the flight authorization and determination of course in the present case are excepted from the Act's coverage by Section 2680(a). *E.g., Goddard* v. *District of Columbia Redevelopment Land Agency*, 287 F.2d 343 (C.A. D.C.), certiorari denied, 366 U.S. 910 (housing redevelopment); *Blaber* v. *United States*, 332 F.2d 629 (C.A. 2) (Atomic Energy Commisssion safety regulations for handling atomic materials); *Mahler* v. *United States*, 306 F.2d 713 (C.A. 3), certiorari denied, 371 U.S. 923 (grant-in-aid highways); *Daniel* v. *United States*, 426 F.2d 281 (C.A. 5) (grant-in-aid highways); *Sickman* v. *United States*, 184 F.2d 616 (C.A. 7), certiorari denied, 341 U.S. 939 (preservation of migratory birds); *Coates* v. *United States*, 181 F.2d 816 (C.A. 8) (Missouri River Flood Control Project); *Builders Corp. of America* v. *United States*, 320 F.2d 425 (C.A. 9), certiorari denied, 376 U.S. 906 (directives from an Army general regarding use of a civilian housing project and discretionary acts by a colonel in implementing them); *Spillway Marina, Inc.* v. *United States*, 445 F.2d 876 (C.A. 10) (drawdown of reservoir).

[18] Though in *Indian Towing Co.* and in *Rayonier* (see n. 13, *supra*) the Court held that the Act does not exempt uniquely governmental activities, the acts involved in those cases were operational, not discretionary, ones. The scope of the discretionary function exemption was not in issue.

Dahlstrom v. *United States,* 228 F. 2d 819 (C.A. 8) (failure by the crew of an aircraft to maintain a proper lookout, after major planning decisions of a discretionary nature had been made, was negligence at the operational level); *Crouse* v. *United States,* 137 F. Supp. 47 (D. Del.) (misfeasance by a truck driver in operating a truck along the route selected by his superiors was negligence at the operational level).

3. While the court below recognized that "the Commander-in-Chief of the Strategic Air Command exercised a discretionary function in ordering supersonic training missions over land areas," it concluded that "the discretion of the Commander-in-Chief * * * and of his subordinates who planned the operating details of this specific flight * * * was restricted by Air Force Regulation 55–34" (Pet. App. A, p. 19). In the court's view, that regulation imposed, in effect, an absolute duty on the Air Force to protect the public from sonic boom damages, either by preventing them or by accepting the responsibility therefor "without qualification" (*id.* at p. 21).

Regulation 55–34 does not, however, modify the specific restriction on the authority to sue the government embodied in the discretionary function exemption under Section 2680(a). Congress alone can do that, and it has not done so (see n. 12, *supra*). By its own terms, moreover, the regulation recognizes the discretionary character of the decision to conduct supersonic flights. The precautions prescribed for assuring "maximum protection for civilian communities" are expressly made applicable only "whenever feasible"

(Pet. App. C, p. 32). The flights are required to avoid populated areas[19] "as much as possible" (*id.* at p. 33). The regulation makes plain that the Air Force has ample "room for policy judgment and decision" (*Dalehite, supra*, 346 U.S. at 36) in its supersonic flight program.[20]

The statement in Regulation 55–34 (Pet. App. C., pp. 35–36) that "the Air Force must accept responsi-

[19] The flight on November 14 comports fully with this policy so far as pertinent here. Nashville, North Carolina, is a rural community in the north-central part of the state, with a population of approximately 1,423 (Rand McNally, *Commercial Atlas and Marketing Guide* (1966 ed.)). The government's affidavits (App. 9–12) indicate that the flight complied with the other provisions of Regulation 55–34.

Moreover, the fact that the Air Force followed Regulation 55–34 in authorizing the flight in question suggests another basis which precludes recovery here. Section 2680(a) also expressly excepts from the Act's authorization to sue "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation * * *." The sonic booms of which respondents complain are the result of acts by Air Force personnel "exercising due care" in the execution of Regulation 55–34, and thus are not actionable. See also 10 U.S.C. 8062 (a) and (c), specifying that the Air Force shall be "capable" for its mission in the country's defense program and recognizing that training and preparation are necessary for that purpose.

[20] *Somerset Seafood Co.* v. *United States*, 193 F. 2d 631 (C.A. 4), on which the court below relied (Pet. App. A, pp. 21–22) for its conclusion that the Air Force had no discretion with respect to the flights, is different from the present case in two important respects. The nondiscretionary duty found in *Somerset* was imposed by a statute, not a regulation; just as Congress could amend the Tort Act to broaden the liability assumed thereunder, so it could impose a mandatory obligation on the government in another statute. Furthermore, the regulation involved here, unlike the statute in *Somerset*, leaves the decisions concerning the flights to the Air Force's discretion.

bility" for sonic boom damages it causes does not change the discretionary nature of the decisions involved in making the flights. The regulation is an internal management device, designed to establish guidelines to be followed by Air Force personnel in connection with supersonic flights. The provisions dealing with the Air Force's assuming responsibility for claims resulting from such flights do not fix or define the rights of claimants. They reflect instead established Air Force claims procedures, and do not speak in terms of "negligence" or "fault" because those elements are not required for all claims which the Air Force is authorized to pay.[21] As the court noted in *Ward* v. *United States*, *supra*, 331 F. Supp. at 375, the regulation "has no bearing on suits brought under the Federal Torts Claim Act. * * * It is the Tort Claims suit that for the first time raises questions about negligent conduct and the applicability or non-applicability of the statutory exceptions such as the discretionary function provision of 28 U.S.C.A. § 2680(a)."

[21] The Military Claims Act authorizes the armed services to pay claims up to a designated maximum for damage resulting from military activities, irrespective of negligence or the government's amenability to suit. See 10 U.S.C. 2733. The Air Force Claims Manual (Air Force Manual 112–1, October 29, 1969, Chap. 7; 32 C.F.R. 842.40–842.48) prescribes detailed procedures for processing these claims, pointing out the distinction between the negligence theory embodied in the Tort Act and the no-fault theory of 10 U.S.C. 2733; an illustrative listing of the types of activities for which the military is responsible under 10 U.S.C. 2733 without regard to fault specifically includes sonic booms (Manual at Sec. 7–2; 32 C.F.R. at 842.42). Regulation 55–34 accords with these provisions in recognizing that causation alone is enough for claims under the Claims Act.

In the instant case, the government, with full awareness of the possible damages that sonic booms might cause, made a high level policy decision to undertake supersonic combat crew training missions—a decision for which it was immune from liability under the discretionary function exception. All the subsequent decisions made in carrying out the flights were based upon and in accordance with that basic policy determination and, under *Dalehite* (346 U.S. at 36), "cannot be actionable."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be reversed and the case remanded to that court for further proceedings consistent with the opinion of this Court.

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APPENDIX

LEGISLATIVE HISTORY OF THE FEDERAL TORT CLAIMS ACT

The first legislative effort to make the United States amenable to suit in tort occurred in 1919 when H.R. 14737, 65th Cong., 3d Sess., was introduced. From 1925 through 1946, when the Federal Tort Claims Act was finally enacted, 32 such bills were introduced in the Congress.[22] The only Congress during that period in which such legislation was not proposed was the 75th.

The earlier bills generally proposed to make the Government liable for the "negligence or wrongful act or omission" of any Government employee. A 1925 bill referred only to negligence (H.R. 12178, 68th Cong., 2d Sess.), while another 1925 bill based liability on a "wrongful act or omission" of an employee (H.R. 12179, 68th Cong., 2d Sess.). In S. 1912 in the first session of the 69th Congress, the two phrases were combined into "negligence or wrongful act or omission" (see Sec. 3 of S. 1912 as it passed the Senate,

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[22] 68th Cong.: H.R. 12178 and H.R. 12179; 69th Cong.: S. 1912, H.R. 6716, and H.R. 8914; 70th Cong.: H.R. 9285; 71st Cong.: S. 4377, H.R. 15428, H.R. 16429, H.R. 17168; 72d Cong.: S. 211, S. 4567, H.R. 5065; 73d Cong.: S. 1833, H.R. 1[illegible], H.R. 8561; 74th Cong.: S. 1043, H.R. 2028; 76th Cong.: S. 2690, H.R. 7236; 77th Cong.: S. 1743, S. 2207, S. 2221, H.R. 5185, H.R. 5299, H.R. 5373, H.R. 6463; 78th Cong.: S. 1114, H.R. 817, H.R. 1356; 79th Cong.: H.R. 181 and S. 2177, the "Legislative Reorganization Act," Title IV of which was the Federal Tort Claims Act, enacted as Public Law 601, approved Aug. 2, 1946, 60 Stat. 842.

67 Cong. Rec. 5605, and Secs. 1 and 201 of the House version), and, with occasional exceptions,[23] that formed the basis for all future versions of what ultimately became the Federal Tort Claims Act.

H.R. 9285, 70th Cong., 1st Sess., containing the reference to "negligence or wrongful act or omission," passed both Houses of Congress, but was pocket vetoed by President Coolidge because the bill gave the Comptroller General (not the Attorney General) the responsibility for defending the claims in court. See S. Rep. No. 766, 71st Cong., 2d Sess., pp. 4, 5.[24] One bill which did not fit into the general pattern was H.R. 8561, 73d Cong., 2d Sess., which proposed to

[23] E.g. H.R. 8914, 69th Cong., 1st Sess. (refers only to "wrongful"); S. 4567, 72d Cong., 1st Sess. (refers only to "negligence"); S. 1833 73d Cong. 1st Sess. (same); H.R. 8561, 73d Cong., 2d Sess., discussed in text *infra;* S. 1043, 74th Cong. 1st Sess. (refers only to negligence); S. 2221, 77th Cong. 2d Sess., which is discussed in the text, *infra*, as enacted by the Senate referred to "negligence".

[24] Many of the early bills contained separate sections dealing with property damage and personal injury. Thus, for instance, H.R. 9285, 70th Congress, 1st Sess., *supra*, the bill which President Coolidge vetoed, provided for coverage of property damage claims where "the damage or loss proximately resulted from the negligence or wrongful act or omission of any officer or employee of the Government within the scope of his office or employment and not out of contract". Sec. 1(a). With respect to personal injury claims, on the other hand, the bill covered injury or death which was either:

"(1) proximately caused by the negligence or wrongful act or omission of any officer or employee of the Government acting within the scope of his office or employment, or (2) proximately attributable to any defect or insufficiency in any machinery, vehicle, appliance, or other materials and such defect or insufficiency was due to the negligence or wrongful omission of an officer or employee of the Government * * *"

Sec. 201 (The Senate version is quoted. See 70 Cong. Rec. 4837-4838.)

make the Government liable for all claims "sounding in tort"; that bill died in committee. Nearly all versions of these early bills—with the exception of H.R. 8561, *supra*—contained numerous specified exceptions to the general proposition that the government would be liable for "negligence or wrongful acts or omissions" of its employees. Section 206 of S. 1833, 73d Cong., 1st Sess., for example, contained 14 such exceptions.

After the hiatus of the 75th Congress, when no tort claim bills were introduced, S. 2690 and H.R. 7236, drafted by the Department of Justice,[25] were introduced in the first session of the 76th Congress. These bills followed the basic pattern of the earlier bills by basing liability on the "negligence or wrongful act or omission" of government employees. In hearings on S. 2690, Alexander Holtzoff, testifying for the Department of Justice, stated that the bill would cover "ordinary" torts.[26] Hearings before a Subcommittee of the Senate Committee on the Judiciary on S. 2690, 76th Cong., 3d Sess. (March 6 and 11, 1940), p. 7. He noted (*id.* at pp. 43–44) that under the language "negligence or wrongful act or omission," "the great majority of the claims that would be cognizable * * * would undoubtedly be covered by the term 'negligent' or 'negligence' ". Mr. Holtzoff urged, however, that the words "or wrongful" not be eliminated from the

[25] See Hearings before the House Committee on the Judiciary on H.R. 5373 and H.R. 6463, 77th Cong. 2d Sess. (January 29, 1942), p. 41.

[26] Assistant Attorney General Shea spoke in similar terms when testifying at hearings in the 77th Congress on H.R. 5373 and 6463. See Hearings before the House Committee on the Judiciary on H.R. 5373 and 6463, *supra*, at pp. 24, 28, 37, 66. See also H. Rep. No. 2245, 77th Cong., 2d Sess., p. 10; H. Rep. No. 1400, 79th Cong., 2d Sess., p. 31.

bill: "[i]f you leave out the words 'wrongful act', it might be held that trespass was omitted from the bill."

Senator Danaher commented that various kinds of trespass which might be considered "wrongful acts" were enumerated in the specific exclusion in subsection 9 of Section 303 of the bill (excepting from coverage "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, * * *"). Mr. Holtzoff, however, pointed out that "some types of 'wrongful acts' and 'trespass' are not enumerated" and hence were covered (*ibid.*). Senator Danaher and Mr. Holtzoff agreed that an example of the kind of trespass which would be covered was "the case of an officer who, without a search warrant, thinks he has probable cause to believe the law is violated and invades somebody's house, * * * if the court should find there was no wrongful act [*e.g.*, by the person whose home was invaded] and turned him loose". Mr. Holtzoff added: "Personally I do not feel very strongly on the subject, because I think the word 'negligent' or 'negligence' will cover the situation. I am sure that would cover the bulk of the claims that would be cognizable under legislation such as is here under consideration." Mr. Holtzoff also pointed out that the proposed law was not a cure-all for every type of damage or injury caused by the government to a citizen: "The bill would not touch the purely moral claims which congressional committees from time to time see fit to recognize by private acts. That type of claims [sic] will still continue to be handled by private acts, because they should be and they are under the control of the Congress at all times' (*id.* at p. 34). S. 2690 and H.R. 7236, like the numerous bills

before them, were not enacted,[27] but the substance of these bills was carried into subsequent bills.

As noted in *United States* v. *Spelar,* 338 U.S. 217, 220 n. 9, the final form of the Federal Tort Claims Act was largely determined in the 77th Congress, which was stimulated by a Presidential message supporting such a law. See H. Doc. No. 562, 77th Cong., 2d Sess. (Jan. 14, 1942). H.R. 5373, as introduced in the first session of the 77th Congress, was essentially identical to H.R. 7236 of the 76th Congress. In the second session, however, the House Committee on the Judiciary prepared a Committee print of H.R. 5373 (January 24, 1942), reintroduced as H.R. 6463 (January 26, 1942), which contained extensive revisions. See Hearings before the House Committee on the Judiciary on H.R. 5373 and H.R. 6463, 77th Cong., 2d Sess. (January 29, 1942), pp. 1–6. These revisions had been drafted by the Department of Justice in collaboration with Congressman Celler. *Id.* at pp. 1, 6. In particular, H.R. 6463, the revised version of H.R. 5373, contained a new exception to governmental liability—which ultimately became 28 U.S.C. 2680(a). Section 402(1) of the committee print excepted from the coverage of the proposed Act:

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Govern-

[27] S. 2690 was never reported out of committee. H.R. 7236 passed the House (86 Cong. Rec. 12032).

> ment, whether or not the discretion involved be abused.

This provision, in essentially identical language, appeared in companion bills introduced in the Senate at this time—S. 2207 (January 16, 1942), and S. 2221 (January 23, 1942)—in tort claims bills in subsequent Congresses and, of course, in the Act as finally passed in 1946.

A House Judiciary Committee memorandum explained the new exception. See Hearings before the House Committee on the Judiciary on H.R. 5373 and H.R. 6463, *supra,* at pp. 37–69. With respect to the bill generally, the memorandum observed (*id.* at p. 39):

> The past 85 years have * * * witnessed a steady encroachment upon the originally unbroken domain of sovereign immunity from legal process for the delicts of its agents. Yet a large and highly important area remains in which no satisfactory remedy has been provided for the wrongs of Government officers or employees, the ordinary "common law" type of tort, such as personal injury or property damage caused by the negligent operation of an automobile.

Concerning the new exception the memorandum noted that "the cases covered by that subsection would probably have been exempted [from the unrevised H.R. 5373] by judicial construction" (*id.* at p. 65). Section 402(1) was intended to preclude "any possibility"

> that the act would be construed to authorize suit for damages against the Government growing out of a legally authorized activity, such as a flood control or irrigation project, where no

> wrongful act or omission on the part of any Government agent is shown, and the only ground for suit is the contention that the same conduct by a private individual would be tortious, or that the statute or regulation authorizing the project was invalid. It is also designed to preclude application of the act to a claim against a regulatory agency, such as the Federal Trade Commission or the Securities and Exchange Commission, based upon an alleged abuse of discretionary authority by an officer or employee.

Id. at pp. 65–66. The memorandum also stated with respect to Section 402(1) (*id.* at p. 44): "It is neither desirable nor intended that the constitutionality of legislation, the legality of regulation, or the propriety of a discretionary administrative act, be tested through the medium of a damage suit for tort." [28]

While the House Judiciary Committee was considering H.R. 6463, the Senate had before it the companion bill, S. 2221. This bill, as introduced on January 23, 1942, contained the identical language of H.R. 6463 with respect to covering damages caused by the "negligent or wrongful act or omission" of any government employee, and also contained the exception contained in Section 402(1) of H.R. 6463. In the Senate Judiciary Committee, however, it was proposed to delete "wrongful" so as to limit coverage of the Act only to negligence. A Committee memorandum explained the purport of the proposed change:

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[28] See also, *e.g.*, the testimony of Assistant Attorney General Shay, *id.* at pp. 28 and 33, and subsequent Committee reports: S. Rep. No. 1196, 77th Cong., 2d Sess., p. 7; H. Rep. No. 2245, 77th Cong., 2d Sess., p. 10; H. Rep. No. 1287, 79th Cong., 1st Sess., pp. 5–6.

> The proposed revision would restrict the operation of the bill to torts based upon negligent acts or ommission [sic] only. This would, however, not interfere with the principal objective of S. 2221, since the majority if not the bulk of tort claims submitted each year to Congress in the form of special bills are predicated upon negligence. The amendment is consistent in principle with Section 402, which excludes from the purview of the bill, claims based upon certain types of intentional tort,[29] or upon abuse of official discretion, or upon execution of an invalid statute or regulation. In view of these express exemptions, the phrase "wrongful act or ommission [sic]" in the bill would probably apply to few if any situations which did not involve negligence.

Discussion of Proposed Revision of S. 2221, Prepared for Use of the Senate Committee on the Judiciary, 77th Cong., 2d Sess. (March 23, 1942), p. 3. The memorandum also noted (p. 7) that if this revision deleting "wrongful" were made, "the operation of the exemption in Sec. 402(1) may be somewhat narrowed, but its importance will remain."

The Senate Judiciary Committee's revision of S. 2221 also contained a second significant change from prior bills. The Committee added an additional exception that explicitly excluded from coverage "a nuisance not involving negligence." The Committee's memorandum explained:

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[29] Section 402(9) of S. 2221, as introduced, excepted from coverage, "Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights." This exception dates from the early bills, *e.g.*, S. 211, 72d Cong., 1st Sess.

> Sec. 402(9) of S. 2221 [n. 29, p. 40, *supra*] exempts from its operation such non-negligent torts as assault, battery, libel, false arrest, deceit and some others. A tort such as a common-law nuisance easily falls into this pattern. It is desirable, however, that an act of nuisance which would also be actionable because of negligence should be subject to the operation of the bill, if the other requirements are present. The proposed revision would thus exempt from the bill nuisances which do not involve negligence.

Discussion of Proposed Revision of S. 2221, Prepared for Use of the Senate Committee on the Judiciary, *supra,* p. 8. The Senate Committee reported out the bill with these proposed changes. See S. Rep. No. 1196, 77th Cong., 2d Sess., pp. 1–4.

The Senate passed S. 2221 with these two changes recommended by its Judiciary Committee. 88 Cong. Rec. 3174. The House Committee on the Judiciary, to which the Senate bill was referred, and which had been holding hearings on the companion measures (H.R. 5373 and 6463), reported the Senate bill favorably, but deleted the two revisions made by the Senate. See H. Rep. No. 2245, 77th Cong., 2d Sess. The House report noted that "wrongful" was restored to the bill because "it would afford relief for certain acts or omissions which may be wrongful but not necessarily negligent" (*id.* at p. 11). The Senate exception for non-negligent nuisances was deleted as unnecessary: "paragraph (1) of section 402 [now 28 U.S.C. 2680 (a)] will exclude claims based upon authorized acts of Government officers or employees exercising due care, which might constitute a nuisance if done by a private person" (*id.* at p. 12).

S. 2221, as revised and reported out by the House Judiciary Committee, was never voted on by the

House in the 77th Congress, but the language recommended by the House Committee in its version of S. 2221 was contained without relevant modification in the tort claims bills in subsequent Congresses and finally became the language of the Federal Tort Claims Act. S. 2221 was reintroduced, without relevent modification from the House Committee's version of that bill, as S. 1114 and H.R. 1356 in the 78th Congress, but no action was taken thereon. It was introduced again in the 79th Congress as H.R. 181 (reported in H. Rep. No. 1287, 79th Cong., 1st Sess.). Senator La Follette incorporated H.R. 181 as Title IV of his omnibus bill, S. 2177,[30] and that bill was enacted by the 79th Congress as the Legislative Reorganization Act of 1946. 60 Stat. 812, 842. The only change of consequence made by Title IV of S. 2177 from prior bills was the elimination of a limitation in the prior bills on the maximum judgment which could be obtained (generally $7500 or $10,000), so that a plaintiff suing the United States would not have a ceiling on his recovery. See S. Rep. No. 1400, 79th Cong., 2d Sess., p. 30.[31]

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[30] See S. Rep. No. 1400, 79th Cong., 2d Sess., pp. 29–34.

[31] The Senate version of the Legislative Reorganization Act contained a total ban on the introduction of private bills in the Congress. See S. 2177 (June 11, 1946), Sec. 121. However, the House amended the bill so that the exclusion would only bar private bills authorizing or directing "the payment of money for property damages, for personal injuries or death for which suit may be instituted under the Federal Tort Claims Act. * * *." Legislative Reorganization Act of 1946, Sec. 131, now 2 U.S.C. 190g. Thus, as Rep. Monroney noted, "All other private claims can be taken care of by a private bill or resolution in the same manner in which they have heretofore been handled." Legislative Reorganization Act of 1946, Committee Print, Joint Committee on the Organization of Congress (July 22, 1946), 79th Cong., 2d Sess., p. 25.

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RESPONDENT'S BRIEF

Supreme Court of the United States

October Term, 1971

No. 71-573

MELVIN LAIRD, SECRETARY OF DEFENSE, ROBERT SEAMANS, JR., SECRETARY OF THE AIR FORCE, AND UNITED STATES OF AMERICA,

Petitioners,

v.

JIM NICK NELMS, ET AL.,

Respondents.

BRIEF FOR RESPONDENTS

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MELVIN LAIRD, ETC., ET AL.,

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v.

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BRIEF FOR RESPONDENTS

QUESTIONS PRESENTED

1. Whether the Fourth Circuit erred in finding the Government strictly liable in view of the constitutional and statutory provisions of North Carolina, the common law relating to ultrahazardous activities and Air Force Regulation 55-34.

2. Whether in any event the case must be remanded for trial under the Fifth Amendment.

SUMMARY OF ARGUMENT

1. The act of omission in this case occurred in the State of North Carolina where the Uniform Aeronautical Act is in force. § 63-12 of the Act provides that the ownership of space above the land and waters of this state is declared to be vested in the several owners of the surface beneath,

subject to the right of flight described in § 63-13. The latter section provides that flight in aircraft over lands and waters of this state is lawful unless at such a low altitude as to interfere with the then existing use which the land or water is put by the owner, or unless so conducted as to be injurious to the health and happiness, or eminently dangerous to persons or property lawfully on the land or water beneath.

Air Force regulation 55-34 provides that when a civilian area has been affected by air force aircraft the air force must accept responsibility for restitution and payment of claims.

In addition, the common law in force in North Carolina provides for liability resulting from ultrahazardous activities causing damages which could not be avoided by the exercise of due care.

2. In any event, the case should be remanded for trial under the Fifth Amendment.

STATEMENT OF FACTS

Respondents' home in North Carolina was damaged by "sonic boom" generated by United States Air Force aircraft, traveling over their home at supersonic speeds in training flights. When the planes passed over respondents' home, the house shook all over, the clock came off the wall. The glass fell over the table. The walls were cracked all over in every room of the house inside and out. Plaster was all over the house and had to be swept up. The glass came out of the door and the kitchen window.

The home of neighbors who live across the highway from respondents' home had window panes broken out at the same time. The plane came over nearly every day at the same time. When the sonic boom came at approximately 2:30 p.m., fish would jump out of a nearby pond. Items

shook on the shelves in a nearby store and bottles rattled out on the floor.

The building blocks in respondents' home were properly laid and the footing was poured according to specifications. The soil was in good condition.

On December 17, 1968, the walls were cracked in every room and the floors had dropped in the center of the house, with it cracking up to such an extent that the house was in danger of falling in. All material used by the respondents in building their home met the specifications of state law and the requirements of the North Carolina Concrete and Masonry Association.

It is impossible to fix the whole house. It must be built from start at a cost estimated at $13,500 by one contractor; $12,000 by another. The contractor said the block walls cracked on all walls and that it was cheaper to build a new house than to undertake to repair the walls of the old house. See Appendix, pages 24 to 39. The house was left in such poor condition that the only value respondents had left was the plot of ground, the well, the trees, etc. The house was built in 1954.

This statement of facts is made in accordance with the rule that in consideration of a motion for summary judgment the Court should take the view of the evidence most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may be drawn from the evidence. *Pierce and Mahone* v. *Ford Motor Co.,* 190 F.2d 910; *Stevens* v. *Howard D. Johnson Co.,* 181 F.2d 390; *Korel* v. *United States,* 246 F.2d 424.

For relevant constitutional and statutory provisions, see Appendix to respondents' brief in opposition to petition for certiorari.

ARGUMENT

I.

The Activity Involved In The Operation Of Supersonic Aircraft Is Of Such A Nature As To Come Within The Classification Of Ultra-Hazardous Activities, Particularly In View Of The North Carolina Constitutional And Statutory Provisions And Regulation 55-34, Making The Operators Strictly Liable.

This seems to be the theory of the Department of the Air Force. The regulation issued October 6, 1967, Clerk's Record, p. 31, states at p. 33 of the Clerk's Record, p. 3 of the regulation:

> "When a civilian area has been affected by Air Force aircraft, the Air Force must accept responsibility for restitution and payment of just claims."

This practice is followed by the Air Force, according to a well written article in the Journal of Air Law and Commerce, Vol. 32, pages 597 to 606, published by the Southern Methodist Law School.

The author says at page 597:

> "In order to establish that a particular sonic boom was the proximate cause of the damage in any given case, it is necessary to consider the extent of damage that a boom can cause."

With reference to recovery under the Federal Tort Claims Act, the author says:

> "In most instances where government or military aircraft have caused sonic boom damage, the Government has paid for any property damage (mostly broken windows and cracked plaster) without the necessity of the claimant's bringing any legal action. Where there have been large scale experiments or exercises, the Government has agreed before the flights took place to

pay for any sonic damage actually caused by such flights."

The author says in a footnote on page 597 that these assertions are still made in the form of letters sent out by the Air Force in response to sonic boom complaints.

Continuing, the author says:

"When the Government receives a complaint, it first sends out a letter indicating its position that the possibility of boom damage in any case is extremely remote. This eliminates approximately 83% of the claims. If the property owner persists, a check is made to determine if a sonic boom occurred near the time and place of the alleged damage. If not, no further steps are taken. If so, investigators are sent to inspect the damaged property, and if all that is found is minor glass and bric-a-brac damage, the Government will normally satisfy the claim.

"However, the Government is extremely reluctant to pay for structural damage to property, and according to Government experience, large plaster cracks do not ordinarily occur in the absence of accompanying glass damage. If suit is brought, the common practice is for the Government to admit liability for damage caused by the boom, but to question the extent of damage proximately caused."

The author says in a footnote on p. 598 that the foregoing information was obtained from officers in the claims section of the Judge Advocate General's Office, Carswell Air Force Base, Ft. Worth, Texas.

Continuing, the author says:

"If it is necessary to bring an action against the Government, either of two basic approaches can be pursued. Claims brought under the Federal Tort Claims Act, 28 U.S.C. 2672, ar determined administratively

while actions brought under 28 U.S.C. 1346 are pursued in the federal courts. § 1346 gives the district court concurrent jurisdiction with the Court of Claims over claims for money damages for injury to or loss of property or personal injury or death caused by the negligence or wrongful act or omission of any employee of the Government acting within the scope of his employment.

"There are two similar theories as to the nature of sonic booms. One group whose theory is more widely accepted explains the phenomena in terms of waves; a second group adheres to a theory based upon the movement of air particles. There is, however uniform agreement among both groups of experts that *the sonic boom is a pressure wave accompanied by noise.* Thus the scientific definition of an explosion seems to coincide with the general definitions of the word explosion. Both definitions include a violent expansion accompanied by noise which follows the sudden production of great pressure. Moreover, the varied occurrences already held to have been explosions indicate the judicial tendency against an extremely limited or rigid classification." (Page 600)

Under the title, Strict Liability, the author writes:

"According to the Restatement of Torts, § 520, Comment (c) 1938. Comment (b) declares that an activity may be ultra hazardous because of the condition which it creates. Comment (a) goes on to say that the rule is applicable to an activity which is of such utility that the risk unavoidably involved in carrying it on, cannot be regarded as so unreasonable as to make it negligence to carry it on.

"An activity is ultra hazardous if it (a) necessarily involves any risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of utmost care, and (b) is not a matter of common knowledge. Even if flight regulations are such

as will keep over pressures within a non-damage range, the Oklahoma City tests indicate that boom scatter or violation (due to wind velocity, temperature, terrain features, humidity, boundary layer turbulence and other meteorological parameters causes one boom in a thousand—at every point in the boom carpet which will be 50 to 80 miles wide, to be twice as strong as the mean strength on the flight tract for a series of flights. Moreover, specifically if flights are planned so that boom caused over pressures will be only 1.5 pounds per square foot during the flight and two pounds per square foot on take-off, the over pressures from one flight in a thousand will be three or four pounds per square foot which, as noted previously, will cause considerable damage to glass and plaster as well as minor structural damage to frames and walls. Therefore, the operation of supersonic transport aircraft will involve a risk of serious hazard to property which cannot be eliminated by the exercise of utmost care and since flying supersonic is not a matter of common usage, such operations should be classified as ultra hazardous activities. (Page 603)

"Previously, both the courts and the law looked upon aviation from the viewpoint expressed by the American Law Institute in 1938 that aviation is an ultrahazardous activity. The Uniform Aeronautic Act adopted in 23 states, imposed absolute liability on the owners, operators and lessees of aircraft for any damage caused by their operation, so long as there was no contributory negligence on the part of the person harmed. (Page 603) However, this view has been rejected since aircraft operation has become safer, and the trend of decisions has established the general rule that an airplane is not an inherently dangerous instrument when properly handled by a competent pilot exercising reasonable care, and that the ordinary rules of negligence apply. (Page 603) However, in the case of sonic booms, this point has not yet been reached, but if technology and procedures should advance to the point where all damage can be eliminated by the exercise of due care, only

then should the courts refuse to find strict liability for boom damage. (Page 604)

"The analogy between 'explosions' and sonic booms may be of use to the landowner in establishing strict liability, as well as in recovering under an insurance policy. Almost all American jurisdictions have held the defendant absolutely liable for injury caused by rocks and debris thrown by blasting. This is true whether the injury is to persons or to property. The majority of states also finds absolute liability for concussion damages resulting from blasting. However, a minority of states does make a distinction and require proof of negligence in concussion cases, unless a nuisance is shown. Sonic booms are very similar to concussion shock waves in that both, being shock waves, involve abnormal pressure zones emanating from outside the premises affected. (Page 605).

"The Courts have relied primarily on two grounds to impose strict liability in blasting cases. Trespass is commonly agreed to have been committed when debris or rocks are thrown onto plaintiff's property. *Asheville Construction Co.* v. *Southern Ry.,* 19 F.2d 32 (4th Cir.).

"The majority of states have refused to distinguish cases in which the damage is caused by the concussion or vibration effects of blasting. Such courts find trespass in both situations. While this theory is still sound, the trend has been to hold the defendant strictly liable because he is engaged in an ultrahazardous activity. Regardless of the theory applied, though, in most jurisdictions, the defendant is held strictly liable for all damages caused by his blasting operations. (Page 604) (Fairfax Inn, Inc. v. Sunnyhill Mining Co., 97 F.Supp. 991 (N.D. W.Va. 1951))

"It is therefore submitted that strict liability should be found applicable against the airlines in the case of damaging sonic booms for two reasons. First, the operation of supersonic aircraft will cause some damage which cannot be eliminated by the exercise of the ut-

most care, and it therefore should be treated as an ultrahazardous activity. Secondly, sonic booms involve the same phenomena and effects as do concussions from blasting; therefore, the blasting laws should apply. (Page 605)

"The statutory standard is no more than a minimum, and does not necessarily preclude a finding that the actor was negligent in failing to take additional precautions. . . . [T]he wholly innocent landowner should be allowed to recover from the airlines, which should be held strictly liable on public policy grounds. Since supersonic transports will cause certain inevitable damage, the airlines should be required to pay their own way. Since the traveling public is demanding supersonic aircraft it should bear the ultimate cost for the actual physical damage to property, which inevitably follows, through the increased fares which the airlines will be forced to charge on supersonic flights." (Page 606)

In *D'Anna* v. *United States, Thompson* v. *United States, Klaus* v. *United States,* 181 F.2d 335, at page 337, Judge Parker speaking for the Court, said:

"One who flies an aeroplane is opposing mechanical forces to the force of gravity and is engaged in an undertaking which is fraught with the gravest danger to persons and property beneath if it is not carefully operated or if the mechanism of the plane and its attachments are not in first class condition. At common law, the hazardous nature of the enterprise subjected the operator of the plane to a rule of absolute liability to one upon the ground who was injured or whose property was damaged as a result of the operation. A.L.I. Restatement Torts secs. 519, 520, d; Prosser on Torts, p. 452."

See also, 6 Am. Jur. 39-40, notes, 99 A.L.R. 176, 83 A.L.R. 336, 69 A.L.R. 320.

Both North and South Carolina have adopted the Uniform Aeronautics Act. Upon a close examination of these statutes, we find that § 2-3 of the South Carolina statute is identical with § 63-11 of the North Carolina statute; that § 2-4 of the South Carolina statute is identical with § 63-12 of the North Carolina statute, and that § 2-5 of the South Carolina statute is identical with § 63-13 of the North Carolina statute. While we have not been able to find in the North Carolina statutes a statute word-for-word like § 2-6 of the South Carolina Code, which provides for absolute liability for injuries to persons or property on lands beneath caused by ascent, descent or flight of aircraft, whether the owner was negligent or not, North Carolina 63-13 as amended when 63-14 was repealed, follows the South Carolina statute with stronger language. Also, the Constitution of North Carolina, art. I, § 17, Bill of Rights, art. I, § 35, and the General Statutes of North Carolina as construed by the North Carolina courts, provide for strict liability. Then too, it must be remembered that the common law long prior to any statutes on the subject, subjected the operator of a plane to the rule of absolute liability because of the hazardous nature of the activity.

United States v. *Praylou*, 208 F.2d 291 (C.A. 4), a South Carolina case, holding that the Government was strictly liable to plaintiffs, pointed out that South Carolina, the state in which the accident occurred, had adopted the Uniform Aeronautics Act which imposes absolute liability without fault on the operators of aircraft for all damages resulting from such operation. For the sake of brevity, we merely quote the headnotes of the case in point.

> "Effect of South Carolina statute imposing absolute liability on owner of aircraft for injury caused by its flight, irrespective of negligence, is to make infliction

of injury or damages by operation of an airplane of itself a wrongful act giving rise to liability, and in that respect, statute does no more than adopt common law rule of liability. Code S.C. 1952, §§ 2-1 et seq. 2-6.

"At common law, hazardous nature of the enterprise subjected operator of airplane to a rule of absolute liability to one upon the ground who was injured or whose property was damaged as a result of the operation.

"State has power to enact legislation imposing liability for invasion of personal and property rights, and such invasion of rights, whether intentional or not, can be made a wrongful act on part of the one guilty of the invasion, and is made such by a statute imposing liability therefor.

"The word 'tortious' is appropriate to describe not only an act which is intended to cause an invasion of an interest legally protected against intentional invasion, or conduct which is negligent as creating an unreasonable risk of invasion of such an interest, but also conduct which is carried on at risk that actor shall be subject to liability for harm caused thereby, although no such harm is intended and the harm cannot be prevented by any precautions or care which it is practicable to require.

"Flight of an airplane at a proper altitude is lawful, but person operating it is charged with responsibility of preventing injury to persons and property beneath, and failure to prevent such injury, whether negligent or not, renders person operating airplane liable at law on theory that it was his duty under the law to prevent it if he undertook to operate the airplane.

* * *

"Congress did not intend to exclude from coverage of Federal Tort Claims Act liability arising from operation of government aircraft merely because under state law liability for injury was made absolute and not dependent upon negligence, nor did Congress intend that there should be liability in states where liability

> under state law is based on negligence and no liability in great majority of states which have adopted Uniform Aeronautics Act. Code S.C. 1952, §§ 2-1 et seq., 2-6; 28 U.S.C.A. §§ 1346(b), 2674." (208 F.2d at pages 291-2)

The theory of absolute liability was apparently assumed by Captain Robert J. Rottman, Hq. MATS and Captain Richard W. Phillips, Hq. MATS, in their article "The Sonic Boom Problem—One Judge Advocate Office Solution." JAG Bul. March-April 62, Vol. IV, No. 2, pages 10-15. Captain Rottman is a graduate of the University of St. Louis and a member of the Missouri bar, and Captain Phillips is a graduate of the University of Miami, and a member of the Florida bar.

These men were stationed at Scott Air Force Base, Illinois. They say (pages 10 and 11):

> "This article will attempt to enumerate the means that we at Scott have utilized to solve our sonic boom problem in the Staff Judge Advocate Office. We are reporting it in this manner in the hope that our experiences can be of benefit to other Staff Judge Advocates who are confronted with a multitude of complaints and claims that may arise due to sonic boom activities in their area. These solutions and methods are the products of trial and error and are what ultimately we considered in our best judgment to be the means of solving the problem."

See also, "Power, Some Results of Oklahoma City Sonic Boom Tests," 4 Materials Res. & Stand. 617.

The theory of strict liability was apparently followed by Judge Craven, sitting in the District Court at Asheville in *Dabney* v. *United States,* 249 F.Supp. 599. In that case, Dabney brought an action against the United States, under the Federal Tort Claims Act, for property damage to his

residence resulting from supersonic flights of government aircraft.

Without referring to the discretionary function exceptions in the Federal Tort Claims Act, or the many questions of law that might have been raised, Judge Craven went straight to the question whether the negligence of the Government, if any, was the proximate cause of the damage claimed. He reasoned:

> "I am not satisfied from the evidence and by its greater weight as to what caused the damage described by the plaintiffs. Defendant urges that all such damage—especially cracks—developed gradually as the buildings settled over the years and simply were not noticed by plaintiffs until the sonic boom incident occurred. It is difficult to exaggerate the power of suggestion on even the most scrupulously honest human mind. But suffice it to say that the evidence does not establish proximate cause."

The pertinent section of the Federal Tort Claims Act states that the Government shall be liable for *injury* or loss of property caused by negligent or *wrongful* act, etc.

In *Boyce* v. *United States,* 93 F.Supp. 866, blasting was said to be the most accepted of all strict liability categories. This extraordinary activity falls within the category which usually results in strict liability. The Court stated that the plaintiffs established causation and that in the absence therefore of the application of the discretionary section of the Act, a recovery in some amount would of necessity have followed in each case. Since it is fundamental that under the substantive law of Iowa, dynamite is a dangerous instrumentality, the use of which so as to damage the property of another constitutes a wrongful act for which a recovery may be had, even though there is no specific charge of negligence or proof thereof.

In *Parcell* v. *United States,* 104 F.Supp. 110, in answering the defendant's contention that the rule of strict liability was not applicable under the Act, the Court said:

> "The words 'wrongful act' in that portion of the statute must be given some meaning. To say that 'wrongful act' is a tautological phrase, meaning negligence is inconsistent with the general rule of statutory interpretation, namely, that no portion of the statute susceptible of meaning is to be treated as superfluou
>
> "In 45 Words and Phrases, page 627, many cases are cited in which the phrase 'wrongful' has been interpreted to mean any act which in the ordinary course of events infringes on the right of another to his damage. . . . To say that a tort giving rise to absolute liability is not a 'wrongful act' would be a technical refinement of language incompatible with that liberal interpretation of the sovereign's waiver of immunity which the highest court in the land has admonished us to employ. . . . (104 F.Supp. at 116)

Whether aviation is treated as an extra hazardous activity or classified as a trespass, there is ample authority that strict liability ensues from ground damage caused by airplanes.

In *Dahlstrom* v. *United States,* 129 F.Supp. 772, the trial court stated that there is persuasive authority to the effect that where the law of the state where the accident occurred makes the injurious flight of aircraft a trespass and therefore imposes liability even in the absence of negligence, then the flight is wrongful within the meaning of the Federal Tort Claims Act.

There are numerous statutes in the various states making the commission of certain acts a violation of law. To illustrate—in nearly every state it is provided that motorists must drive on the right side of the road. A failure to do so gives rise to a cause of action leaving to be determined only

the questions of proximate cause and the amount of damages. It is therefore a wrongful act to drive on the wrong side of the road because the statute so provides.

It is submitted that the Court determined in *Praylou* the true rule to be that if the particular local law to be applied imposes absolute liability on private individuals for a certain activity, then the United States is subject to a like imposition. The Supreme Court denied certiorari, 347 U.S. 934. The function of certiorari is to correct substantial errors of law committed by a judicial tribunal which are not otherwise reviewable by a court. Certiorari will be granted, it is said, only where there are special and important reasons therefor. The Government contends in this case, page 21 of its brief, "The decision below would result in the United States, in effect, becoming an insurer as to all losses occasioned by its ultrahazardous activities. In view of the vast number of governmental activities many of which doubtless can be termed ultrahazardous, the Government's liability would be enormous." The same contentions were applicable to the *Praylou* case, and yet this Court did not consider them "special and important reasons" for granting certiorari. Moreover, when did the *amount* of damages become relevant on the question of liability? According to the Journal of Air Law and Commerce, Vol. 32, page 597-606, published by the Southern Methodist Law School, the wholly innocent landowner should be allowed to recover from the airlines which should be held strictly liable on public policy. Since supersonic transports will cause certain inevitable damage, the airlines should be required to pay their own way. Since the traveling public is demanding supersonic aircraft, it should bear the ultimate cost for the actual physical damage to property, which inevitably follows, through the increased fares which the airlines will be forced

to charge on supersonic flights. (Page 606 of said article) The same reasoning should apply to the Federal Government. Since its training flights and other operations involving supersonic planes are necessary to the national defense and will inevitably cause damage to property beneath the flights, there is no reason why the individual should sustain this damage instead of the damage being borne by the entire public through taxation. It is totally unfair and unjustifiable to require the individuals to stand the loss incident to a project instituted and conducted for the benefit and protection of the public in general.

Since sonic booms are very similar to concussion shock waves in that both, being shock waves, involve abnormal pressure zones emanating from outside the premises affected, they are analogous to the results of blasting operations by one on his own premises but affecting his neighbors. The North Carolina law on this subject is well stated in 260 N.C. 69, 131 S.E.2d 900, at page 901, in *Guilford Realty & Ins. Co.* v. *Blythe Bros. Co.,* where the Court held that one conducting blasting operations in close proximity to houses is liable for damages to the houses and property produced by the concussion and vibrations caused by the blasting, notwithstanding lack of negligence.

In the USA many law school professors have advocated the acceptance of absolute liability for damages caused by aircraft. 80 *Harv. L. Rev.* No. 3, page 560. It appears that the USA delegation has abandoned a long-standing historical objection and accepted the principle of liability in behalf of the USA. 80 *Harv. L .Rev.* No. 3, page 561.

For an instructive discussion of "Sonic Boom Damage" see *Journal of Air Law & Commerce,* Southern Methodist University School of Law, Dallas, Texas, Vol. 36, 599-602.

THE PILOTS FLYING THE SUPERSONIC FLIGHTS IN THIS CASE WERE UNDER A MANDATORY DUTY IMPOSED BY THE COMMON LAW OF NORTH CAROLINA, THE RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS OF THAT STATE AND AIR FORCE REGULATION 55-34, TO MAKE SUCH FLIGHTS SO AS TO AVOID DAMAGE TO PROPERTY OWNERS ON THE GROUND BENEATH THE FLIGHTS. THEY HAD NO DISCRETION TO DO OTHERWISE NOR DID THEIR SUPERIORS HAVE ANY DISCRETION TO ORDER THEM TO DO OTHERWISE. WHEN THEY VIOLATED THE LAW AND CREATED SONIC BOOMS DAMAGING PROPERTY BENEATH THE FLIGHTS, THEY WERE GUILTY OF TRESPASSES CREATING ABSOLUTE LIABILITY.

The great boast of the common law is that it has a remedy for every wrong. In order to have a remedy for changed conditions, the common law amends itself to meet the changing conditions of society. The late Judge Parker paid this beautiful tribute to the common law in *Barnes Coal Corp.* v. *Retail Coal Merchants Asso., et al.,* 128 F.2d 645, at page 648:

> "It must be remembered, in this connection, that the common law is not a static but a dynamic and growing thing. Its rules arise from the application of reason to the changing condition of society. It inheres in the life of society, not in the decisions interpreting that life; and, while decisions are looked to as evidence of the rules, they are not to be construed as limitations upon the growth of the law but as landmarks evidencing its development. As was said in Hurtado v. California, 110 U.S. 516, 530, 4 S.Ct. 292, 28 L. Ed. 232, 'Flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law,' and, in the recent case of Funk v. United States, 290 U.S. 371, 54 S.Ct. 212, 216, 78 L. Ed. 369, 93 A.L.R. 1136, wherein

> the ancient rule that the wife was not a competent witness for the husband in a criminal trial was repudiated on the ground that it was no longer in harmony with the spirit of the common law as it had developed, the Court quoted this statement from Hurtado v. California as to the flexibility and capacity for growth of the common law, and went on to say: 'To concede this capacity for growth and change in the common law' by drawing 'its inspiration from every fountain of justice,' and at the same time to say that the courts of this country are forever bound to perpetuate such of its rules as, by every reasonable test, are found to be neither wise nor just, because we have once adopted them as suited to our situation and institutions at a particular time, is to deny to the common law in the place of its adoption a 'flexibility and capacity for growth and adaptation' which was 'the peculiar boast and excellence' of the system in the place of its origin."

It should be borne in mind that the Federal Tort Claims Act imposes liability upon the Government where the United States, if a private person, would be liable to the claimant. The Act then excepts only claims based upon the exercise or performance, or failure to exercise or perform a discretionary function. The performance or failure to perform relates only to a discretionary function.

When a government agency has been under a common law or statutory duty to act in a specific way and intentionally has not, the courts have refused to extend the protection of the discretionary function exception. Thus when the coast guard failed in a mandatory duty imposed by statute to mark or remove wrecked ships (*Somerset Seafood Co.* v. *United States,* 193 F.2d 631 (4th Cir. 1951)), the government was held liable. When an individual can only act legally in one way, there is no discretion involved but merely a failure in duty.

The Government had no discretion as to whether it would comply with the common law, and certainly it had no discretion as to whether it would comply with the constitutional and statutory provisions of the State of North Carolina. We have already noted that these provisions require the Government to pay for damages done by the Government in cases of this kind. The complaint in this case is not "based upon" the performance or failure to perform such functions. It is, instead, based upon the acts or omissions which have nothing to do with such discretionary functions or duties.

In *Smith* v. *United States,* 116 F.Supp. 801, plaintiff's water supply was diminished because of the construction and maintenance of an air base. In denying the Government's motion to dismiss, the district court held that the statutory protection was afforded only to negligent acts committed in accordance with a discretionary plan.

In *Jemison, etc.* v. *The Dredge Duplex* and *City of Mobile* v. *The Dredge Duplex* and *Ginn* v. *Great Lakes Dredge & Dock Co.,* 163 F.Supp. 947, the wharf owner sued the government dredging contractors to recover for injuries to wharves sustained because the dredging was done at a level below the wharf. The contractors impleaded the Government. The court held that where the contractors had performed work in accordance with plans and specifications and used due care, but the Government had been negligent in ordering the dredging done at too low a level, the Government and not the contractors was liable.

It will thus be seen that the Government here was under a duty to do the dredging at a level which would not result in damages to the property owners.

In *United States* v. *White,* 211 F.2d 79, page 82, the Court held that when the common law imposes a duty on the United States in its capacity as landowner to warn an

invitee of known dangers on the premises, the discretionary function exclusion is no defense to an action based on failure to warn.

In *United States* v. *Washington,* 351 F.2d 913, 916-17, the discretionary function exception was held inapplicable where the Government constructed and maintained power transmission lines some 500 feet above ground but failed to warn airplane pilots of its location and height by painting the towers brightly or by equipping them with flashing lights or in some other manner.

It has been held in numerous cases that the Government is liable in malpractice cases arising in veterans' hospitals because the Government is charged with a *dual duty* in ascertaining the patient's condition, that is a duty to advise him of what that condition is and a duty to render proper care and treatment for that condition—breach of the latter duty is actionable even though breach of the former is not. *Hungerford* v. *United States,* 307 F.2d 99, at 102-103.

In the *Hungerford* case, the Government had not only the duty to communicate to Hungerford a correct diagnosis of his condition but also to render proper care of the physical condition from which he was actually suffering. Under the allegations of the complaint, there was a failure to perform this latter duty because of the negligent manner in which the examination and diagnostic tests were made or because of the failure to make tests which in the exercise of proper care should have been made.

The Court therefore held that the alleged breach of duty and resulting injury set out in the complaint is not excepted from the application of the F.T.C.A. and that the action should not have been dismissed.

In *Beech* v. *United States,* 345 F.2d 872, 874 (5th Cir.), where the claimant alleged that following her fall on the

slippery floor of an army hospital, government medical personnel aggravated her injuries by improper diagnosis and treatment, the Court rejected the Government's argument that the malpractice claim was barred by the misrepresentation exclusion. As in the *Hungerford* case, the Court asserted that the Government had not only a duty to communicate to the claimant a diagnosis of her condition but also to render proper care for her treatment. The complaint alleged a failure to perform the latter duty and the Court held that such failure is not covered by § 2680(a) exception.

In *Frentz* v. *United States,* 163 F.Supp. 698, a pedestrian was permitted to recover against the United States for injuries sustained when he was compelled to jump from a raised drawbridge operated by employees of the Government. The accident occurred when the plaintiff, caught on the bridge while it was being raised, jumped from the raising end to the concrete roadway several feet below. The Court held that it was the duty of the defendant not to raise the bridge while a pedestrian was on it. The fact that the bridge operator and his assistant whose duty it was to advise the operator when the bridge could be raised, did not know that the plaintiff was on the bridge because their attention was elsewhere engaged did not absolve them of the duty to see what they could have and should have seen before raising the bridge.

The Effect Of Air Force Regulation 55-34

10 *U.S.C.A.,* § 8061 provides "The President may prescribe regulations for the government of the Air Force."

Judge Butzner of the Fourth Circuit held that:

> ". . . [T]he discretion of the Commander-in-Chief who authorized the training program and of his subordinates who planned the operating details of this specific flight

over North Carolina was restricted by Air Force Regulation 55-34. The regulation directed them to take detailed precautions in planning 'maximum protection for civilian communities.' AF Reg. 55-34 ¶ 3. Maximum, defined as 'greatest in quantity or highest in degree attainable or attained,' Webster's Third New International Dictionary (1964), must be given full effect in interpreting the regulation. That the regulation leaves no room for affording the public less protection is apparent from paragraph 4, which recognizes that despite all precautions, damage may result from sonic booms, and in that event, requires the Air Force to accept responsibility for restitution without qualification and pay all just claims."

* * *

"Normally, we would require that an evaluation of the seriousness of the risk created by supersonic flight be made largely on the basis of competent evidence introduced at trial. For even though the normal pressure distribution in a sonic boom is generally understood, variations in pressure due to meteorological phenomena and topological features apparently do occur. But in this case, we can rely on the Air Force's own assessment of the potential for harm from sonic booms Air Force Regulation 55-34 provides a satisfactory basis to meet the requirements of § 520 of the Restatement. In paragraph 3 it orders maximum protection to be afforded civilian communities. In paragraph 4 it says that damage may nonetheless occur. The regulation, therefore, is a frank admission that the potential for destructiveness from sonic booms is a continual risk of supersonic flight. Since the Air Force is in the best position to affirm that, despite the utmost care, sonic booms pose a substantial risk to the property of others, it should not be permitted to prove otherwise." (442 F.2d at pages 1165 and 1169)

While Judge Butzner cited no authority to support this

interpretation, no doubt he knew that the authorities in favor of his interpretation were so overwhelming that citation of authority was unnecessary.

We list below the authorities supporting his interpretation with the holding in each.

(1) *Nordmann* v. *Woodring,* 28 F.Supp 573. (When regulation of the Army and Navy are promulgated through the Secretary of War, they must be received as acts of the President and as such must be binding on all within the sphere of his authority. United States Constitution, article II)

(2) *Gratiot* v. *United States,* 4 How. 74, at page 118. (As to the Army regulations, this Court has too repeatedly said that they have the force of law, to make it proper to discuss that point anew, and such of them as were assailed in this case by counsel as not warranted by law, the Court thinks are as obligatory as any of the rest.)

(3) *Ex parte Reed,* 100 U.S. 13 (These regulations have the force of law, meaning regulations established by the Secretary of the Navy with the approval of the President have the force of law.)

(4) *Standard Oil Co. of California* v. *Johnson,* 316 U.S. 481, 62 S.Ct. 1168 (War Department regulations have the force of law.)

(5) *Hironimus* v. *Durant,* 168 F.2d 288 (Army regulations under which an officer on terminal leave is entitled to receive hospital benefits and medical treatment which are available to officers on active duty have the force of law.)

(6) *Birdwhistle* v. *Tennessee Valley Authority,* 254 F. Supp. 78 (Authority was liable in detonating blasts causing damage to adjoining property even though there was no

negligence and the discretionary function of the Federal Tort Claims Act did not bar recovery.)

(7) 6 *C.J.S.,* Army and Navy, § 2, Army regulations are rules for the government of the Army, published and proclaimed by the express authority of Congress or by the President as Commander-in-Chief of the Army or as Chief Executive. The President in such cases generally acting through Secretary of War—not necessary for Secretary of War in promulgating such rules or orders to state that they emanate from the President—presumption is that the Secretary is acting with the President's approbation and under his direction. To the same effect are regulations for the government of the Navy, and when issued by the Secretary of the Navy are presumed to have been issued with the approval of the President although they do not bear his name.

The latest text on the subject is found in *Am. Jur. 2d,* Volume 53, page 962, where the author says:

> "While the Federal Constitution provides that Congress shall have power to make rules and regulations for the government of the land and naval forces, it has been held that the power of the executive authority to establish rules and regulations for the government of the Armed Forces, within certain limits, is undoubted, and has, in fact, been specifically authorized by Congress with respect to all of the President's functions, powers, and duties under Title 10 USC, dealing with the Armed Forces. These regulations derive their force from the power of the President as Commander in Chief, and are binding upon all within the sphere of his legal and constitutional authority, and since they have the force and effect of law, they cannot be questioned or defied because they may be thought unwise or mistaken."

(8) *Levy* v. *Dillon,* 286 F.Supp. 593 (Army regulations unless inconsistent with existing statutory enactments, have the force of law.)

(9) *Terry* v. *United States,* 97 F.Supp. 804 (Army regulations are in effect administrative determinations of meaning of the basic statutes as applied to the Army and where within the authority of the statutes, they must be accorded the force of law.)

(10) *Nixon* v. *Secretary of Navy,* 422 F.2d 934 (While the courts are reluctant to interfere in military affairs, the Navy is bound by its own validly promulgated regulations.)

(11) *Feliciano* v. *Laird,* 426 F.2d 424 (As we recently reiterated in *Nixon* v. *Secretary of Navy,* the Army is bound by its own regulations.)

(12) *U.S. ex rel. Brooks* v. *Clifford,* 409 F.2d 700 (Army and Department of Defense regulations must be followed scrupulously.)

(13) *Hamlin* v. *United States,* 391 F.2d 941 (The Secretary of the Army is bound by his own regulations.)

(14) *Cravens* v. *United States,* 124 Ct. Cl. 415 (It was not the intent of Congress in authorizing the Secretaries of the Armed Services to issue regulations having the force of law, to lodge in the Secretaries the power to depart, in individual cases, from the law which they made.)

(15) *United States* v. *Clifford,* 409 F.2d 700 (Suggesting that such regulations are not required but when regulations have in fact been promulgated, they must be followed scrupulously.)

(16) *In re Brodie,* 128 F. 665. (Rules and orders promulgated by the Secretary of War for the government of the Army are presumed to be issued by the Secretary with the approbation and under the direction of the President, as commander-in-chief, though they do not expressly so state.)

(17) *Bluth* v. *Laird,* 435 F.2d 1065. (When the sovereign has established rules to govern its own conduct, it will be held to the self-imposed limitation on its own authority, departure from which denies procedural due process of law.)

(18) *Spencer* v. *United States,* 100 F.Supp. 444. (Army regulations have the force of law.)

(19) *Goldenberg* v. *Village of Capitan,* 227 P.2d 630, 55 N.M. 122 (The regulation of Federal Bureau of Naval Personnel requiring Naval Reserve Officers and men, placed on active duty, to devote their whole time to naval duties and not engage in private employment has the force of law.)

(20) *Edwards* v. *Madigan,* 281 F.2d 73 (The Secretary of the Army has authority to issue regulations, and such are presumably valid, unless arbitrary and unreasonable or plainly and palpably inconsistent with the law.)

(21) *Prichard* v. *United States,* 133 Ct. Cl. 212, 216; *Ludzinski* v. *United States,* 154 Ct. Cl. 215 (Departmental regulations which are reasonably designed to carry into effect acts of Congress have the force and effect of law, and in the case of the military services are binding on retiring boards, the Surgeon General, the Disability Review Board, the Board for the Correction of Military Records, and the Secretaries of the Armed Services.)

(22) *United States* v. *Harleysville Mut. Cas. Co.,* 150 F. Supp. 326 (Army regulation promulgated within authority of statute has force of law.)

(23) *Brame* v. *Garner,* 101 S.E.2d 292 (Duly authorized and promulgated army regulations have the force of law.)

(24) *Henneberger* v. *United States,* 403 F.2d 237 (Secretary of the Navy's regulations concerning release of reserve

personnel, "active duty agreements," and requests for extensions, were reasonably designed to effectuate statutes and promulgated pursuant to statutes, and had force and effect of law.)

(25) *O'Connor* v. *McKean,* 325 F.Supp. 38 (Army and Department of Defense regulations should be followed scrupulously once promulgated.)

(26) *Pifer* v. *Laird,* 328 F.Supp. 649 (Army is entitled to first crack at interpreting its own regulations and to great deal of deference in interpretations it reaches. Fact that change in Army regulation relating to handling conscientious objector applications was not published in federal register did not invalidate regulation since regulation was internal personnel matter within exception to Administrative Procedure Act.)

(27) *Epstein* v. *Commanding Officer,* 327 F.Supp. 1122 (Army is bound to follow its own regulations, and its violation of regulation declaring duty of military authorities to inform and advise soldier how, where and when to submit conscientious objector application and to process it constitutes a violation of due process of law.)

(28) *Rehart* v. *Clark,* 448 F.2d 170 (United States Navy regulations issued by Secretary of Navy with approval of President have force of law.)

(29) *Ex parte Bright,* 1 Utah 145 (1874) (Military law is as clearly defined as is any system of statute, common, or civil law. It consists of the articles of war enacted by Congress, the regulations and instructions sanctioned by the President, the orders of commanding officers, and certain usages and customs constituting the unwritten or common law of the Army.)

(30) *Wildwood Mink Ranch* v. *United States,* 218 F. Supp. 67 (It is familiar law that violation of a statute (and this regulation has the force of a statute) is negligence *per se.*) The statute in that case was identical with the statute in this case and the regulation was similar to the regulation in this case.

(31) *Rader, et al.* v. *Apple Valley Building & Development Co.,* 61 Cal. Rptr. 108 (Court took judicial notice of the Federal aviation regulations which plaintiffs had pleaded, as well as the Federal Aviation Act.)

Candor requires us to say that there is one case which expresses an opinion on the subject contrary to the opinions in the 31 cited authorities. We refer to *Ward* v. *United States,* 331 F.Supp. 369. In that case, a sonic boom allegedly caused an automobile to fall upon the plaintiff. Judge McCune, District Judge, writing the opinion for the court, *after examining the state law,* held that the Air Force by internal regulations No. 55-34 could not waive the Government's statutory discretionary function exception from the Federal Tort Claims Act.

It will be observed that Judge McCune examined the state law before reaching his conclusion. This, of course, was required by the Federal Tort Claims Act which creates liability "*in accordance with the law of the place where the act or omission occurred.*" (28 U.S.C.A. § 1346(b)) According to Martindale-Hubbell, 1972 Edition, Volume 5, Law Digests, the Uniform Aerodynamics Act has not been adopted in Pennsylvania. As we have observed, the Act was in force in North Carolina when *Nelms* was decided and was relied on by the Supreme Court in *United States* v. *Causby,* 328 U.S. 256, 66 S.Ct. 1062. The *Ward* case is on appeal to the Third Circuit and the court is deferring its decision until this Court decides this case.

DALEHITE CASE, 346 U.S. 15, 73 S.CT. 956

This case is heavily relied on by the Government in support of its contentions. It is cited 15 times. The case was one against the United States for wrongful death resulting from an explosion of ammonium nitrate fertilizer stored in vessels in Texas harbor. The fertilizer had been produced and distributed at the instance, according to the specifications and under the control of the United States, in connection with a foreign aid and relief program following World War II. Action was under the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-2678, 2680, 28 U.S.C.A. §§ 1346, 2671-2678, 2680. The plaintiffs claimed negligence substantially on the part of the entire body of the federal officials and employees involved in a program of production of the material—fertilizer grade ammonium nitrate (referred to as FGAN) in which the original fire occurred and which exploded. FGAN's basic ingredient was ammonium nitrate, long used as a component in explosives. Its adaptability as a fertilizer stemmed from its high free nitrogen content. The suit for damages predicated Government liability on the participation of the United States in the manufacture and transportation of FGAN. Plaintiff charged that the Federal Government had brought liability on itself for the catastrophe by using a material in fertilizer which had been used as an ingredient of explosives for so long that industry knowledge gave notice that other combinations of ammonium nitrate with other materials might explode. It was charged that the Government, without definitive investigation of FGAN properties, shipped or permitted shipment to a congested area without warning of the possibility of explosion under certain conditions. The district court accepted this theory and found for the plaintiff; the Circuit Court for the Fifth

Circuit reversed. This Court held that the acts of the Government in formulating a plan for the manufacture of such fertilizer, and in carrying it out, were under the circumstances acts of discretion not resulting in liability. There was no local statute to guide the Court, nor was there any local regulation on the subject. Apparently the only applicable law was the rule of the common law involving ultrahazardous activities. The Court held that this rule did not apply, because the evidence warranted the conclusion that the fertilizer was a material that former experience showed could be handled safely in a manner handled under the Government's program, and that no negligence existed in connection therewith. Said the Court:

> " 'There must be knowledge of a danger, not merely possible, but probable,' MacPherson v. Buick Motor Co., 217 N.Y. 382, 389, 111 N.E. 1050, 1053, L.R.A. 1916F, 696. Here, nothing so startling was adduced. The entirety of the evidence compels the view that FGAN was a material that former experience showed could be handled safely in the manner it was handled here. Even now no one has suggested that the ignition of FGAN was anything but a complex result of the interacting factors of mass, heat, pressure and composition." (73 S.Ct. at page 971)

The Circuit Court, Butzner, Circuit Judge, distinguished *Nelms* on this ground, quoting the identical paragraph we have quoted above. Continuing, the Court said:

> "The unforeseeability of harm in the Texas City explosion contrasted with the likelihood of harm from sonic booms raises a distinction so significant that Dalehite cannot be considered to control the case before us. By its reliance on the quoted language in MacPherson,

> the Court indicated that the exception is inapplicable when the government knows harm is probable. There is an obvious difference between the unencumbered right to make decisions for the general welfare and the unrestricted power to disregard predictable danger to the public at large. Here the release of a destructive force—a sonic boom—was deliberately planned, and the likelihood of harm to some civilians was known to exist despite all precautionary measures the planners could take. These factors, not found in Dalehite, make that case inapplicable. The inability to prevent a deliberately released destructive force from causing harm, it seems to us, provides an appropriate limit to the discretionary function exception."

We think this argument is unanswerable.

The *Dalehite* case recognizes the principle applicable where the case is governed by local statutes or regulations. Responding to the argument for absolute liability, page 972 of the opinion in 73 S.Ct., the Court said:

> ". . . [T]he Act does not extend to such situations, though of course well known in tort law generally. It is to be invoked only on a 'negligent or wrongful act or omission' of an employee. Absolute liability, of course, arises irrespective of how the tortfeasor conducts himself; it is imposed automatically when any damages are sustained as a result of the decision to engage in the dangerous activity. The degree of care used in performing the activity is irrelevant to the application of that doctrine. But the statute requires a negligent act. So it is our judgment that liability does not arise by virtue either of United States ownership of an 'inherently dangerous commodity' or property, or of engaging in an 'extra hazardous' activity. United States v. Hull, 1 Cir., 195 F.2d 64, 67." (73 S.Ct. at page 972)

Interpretation has vastly enlarged the sphere of responsibility of the Government since the *Dalehite* case.[1] These cases seem to answer Mr. Justice Jackson's sarcastic comment in his dissent in *Dalehite,* that "The ancient and discredited doctrine that the king can do no wrong has not been uprooted; it has merely been amended to read the king can do only little wrongs. . . ."

One of the most important points decided in *Indian Towing Company,* is that municipal corporations law recognizing distinction, as to tort liability, between governmental and non-governmental or proprietary functions, is not applicable in construction of Federal Tort Claims Act, saying:

> "Government is not partly public or partly private, depending upon the governmental pedigree of the type of a particular activity or the manner in which the Government conducts it." (76 S.Ct. at page 126)

To the same effect is *Rayonier,* where this Court said:

> "We expressly decided in Indian Towing that the United States' liability is not restricted to the liability of a municipal corporation or other public body and that an injured party cannot be deprived of his rights

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[1] *Indian Towing Co.* v. *United States,* 350 U.S. 61, 76 S.Ct. 122 (1955); *Rayonier* v. *United States,* 352 U.S. 315, 77 S.Ct. 374 (1957); *Exchange Bank of Madison, Wis.* v. *United States,* 257 F.2d 938 (7 C.C.A. 1958); *United States* v. *Alexander,* 238 F.2d 314 (5 C.C.A. 1956); *Dahlstrom* v. *United States,* 228 F.2d 819 (C.C.C. 1956); *McCormick* v. *United States,* 159 F.Supp. 920 (Minn. 1958); *United Air Lines, Inc.* v. *Wiener and United States* v. *Wiener,* 335 F.2d 379 (1964); *Estate of Burks* v. *Ross,* 438 F.2d 230 (1971); *Simons* v. *United States,* 413 F.2d 531 (1969); *Smith* v. *United States,* 375 F.2d 243 (1967); *Ingham* v. *Eastern Air Lines, Inc.,* 373 F.2d 227 (1967); *Montellier* v. *United States,* 202 F.Supp. 384 (1962); *Bevilacqua* v. *United States,* 122 F.Supp. 493 (1954); *Emelwon, Inc.* v. *United States,* 391 F.2d 9 (1968); *H. L. Properties, Inc.* v. *Aerojet-General Corp.,* 331 F.Supp. 1006 (1971); *White* v. *United States,* 317 F.2d 13 (1963).

> under the Act by resort to an alleged distinction, imported from the law of municipal corporations, between the Government's negligence when it acts in a 'proprietary' capacity and its negligence when it acts in a 'uniquely governmental' capacity. To the extent that there was anything to the contrary in the Dalehite case it was necessarily rejected by Indian Towing." (77 S.Ct. page 376-77)

In *Exchange Bank of Madison, Wis.,* the Court said, among other things.

> "It seems clear to us that Congress has said in unambiguous language that the United States is to be treated exactly as a private individual and not as a sovereign entity in determining its liability." (257 F.2d at page 940)

In *United States* v. *Alexander,* after reviewing the Supreme Court decision, the Court held the Act is to be liberally construed; that the rule of strict construction, applicable to other statutes waiving governmental immunity does not apply to the Federal Tort Claims Act.

In *Dahlstrom,* the Court said:

> "Furthermore, the Government in effect reads the statute as imposing liability in the same manner as if it were a municipal corporation and not as if it were a private person, and it would thus push the courts into the 'governmental'—'nongovernmental' quagmire that has long plagued the law of municipal corporations. * * * 'The Federal Tort Claims Act cuts the ground under that doctrine; it is not self-defeating by covertly embedding the casuistries of municipal liability for torts.' * * * 'While the area of liability is circumscribed by certain provisions of the Federal Tort Claims Act, see 28 U.S.C. § 2680, 28 U.S.C.A. § 3680, all Government activity is inescapably 'uniquely governmental' in

that it is performed by the Government. There is nothing in the Tort Claims Act which shows that Congress intended to draw distinctions so finespun and capricious as to be incapable of being held in the mind for adequate formulation.' " (228 F.2d at page 822)

II.

Whether In Any Event The Case Must Be Remanded For Trial Under The Fifth Amendment.

In *Palisades Citizens Asso., Inc.* v. *Civil Aeronautics Board & Washington Airways,* 420 F.2d 188, Judge Tamm, speaking for the Court said:

". . . where that invasion is destructive of the landowner's right to possess and use his land, it is compensable either through private tort actions or under the fifth amendment where the use, by the government, amounts to a 'taking.' " (Citing United States v. Causby)

Causby involved a suit in the Court of Claims against the United States to recover for an alleged taking by the Government of plaintiff's home and chicken farm which was adjacent to a municipal airport leased to the Government in the State of North Carolina. As many as 150 chickens were killed when they flew into the walls from fright. The noise was startling. At night the glare from the planes brightly lighted up the place. As a result of the noise, respondents had to give up the chicken business. The result was the destruction of the use of the property as a commercial chicken farm. In addition, respondents were frequently deprived of their sleep and the family had become nervous and frightened. The Court of Claims found that respondents' property had depreciated in value and found in favor of respondent.

Mr. Justice Douglas, in delivering the opinion in this Court, said the case was one of first impression. The problem presented, he said, is whether respondents' property was taken within the meaning of the Fifth Amendment by frequent and regular flights of army and navy aircraft over respondents' property. After discussing the question at some length and referring to the ancient doctrine that the common law ownership of land extended to the periphery of the universe; but that such a doctrine has no place in the modern world, Mr. Justice Douglas continues:

". . . But that general principle does not control the present case. For the United States conceded on oral argument that if the flights over respondents' property rendered it uninhabitable, there would be a taking compensable under the Fifth Amendment. It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken. United States v. Miller, 317 U.S. 369, 63 S.Ct. 276, 87 L. Ed. 336, 147 A.L.R. 55. Market value fairly determined is the normal measure of the recovery. Id. And that value may reflect the use to which the land could readily be converted, as well as the existing use. United States v. Powelson, 319 U.S. 266, 275, 63 S.Ct. 1047, 1053, 87 L. Ed. 1390, and cases cited. If, by reason of the frequency and altitude of the flights, respondents could not use this land for any purpose, their loss would be complete. It would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it.

"We agree that in those circumstances there could be a taking. Though it would be only an easement of flight which was taken, that easement, if permanent and not merely temporary, normally would be the equivalent of a fee interest. It would be a definite exercise of complete dominion and control over the surface of the land. The fact that the planes never

touched the surface would be as irrelevant as the absence in this day of the feudal livery of seisin on the transfer of real estate. The owner's right to possess and exploit the land—that it to say, his beneficial ownership of it—would be destroyed. It would not be a case of incidental damages arising from a legalized nuisance such as was involved in Richards v. Washington Terminal Co., 233 U.S. 546, 34 S.Ct. 654, 58 L. Ed. 1088, L.R.A. 1915A, 887. In that case property owners whose lands adjoined a railroad line were denied recovery for damages resulting from the noise, vibrations, smoke and the like, incidental to the operations of the trains. In the supposed case the line of flight is over the land. And the land is appropriated as directly and completely as if it were used for the runways themselves.

"There is no material difference between the supposed case and the present one, except that here enjoyment and use of the land are not completely destroyed. But that does not seem to us to be controlling. The path of glide for airplanes might reduce a valuable factory site to grazing land, an orchard to a vegetable patch, a residential section to a wheat field. Some value would remain. But the use of the airspace immediately above the land would limit the utility of the land and cause a diminution in its value.

"The fact that the path of glide taken by the planes was that approved by the Civil Aeronautics Authority does not change the result.

"We have said that the airspace is a public highway. Yet it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere.

". . . We said in United States v. Powelson, supra, 319 U.S. at page 279, 63 S.Ct. at page 1054, 87 L. Ed. 1390, that while the meaning of 'property' as used in the Fifth Amendment was a federal question, 'it will normally obtain its content by reference to local law.' If we look to North Carolina law, we reach the same result. Sovereignty in the airspace rests in the State

'except where granted to and assumed by the United States.' Gen. Stats., 1943, § 63-11.

"The flight of aircraft is lawful 'unless at such a low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath.' Id., § 63-13. Subject to that right of flight, 'ownership of the space above the lands and waters of this State is declared to be vested in the several owners of the surface beneath.' Id. § 63-12. Our holding that there was an invasion of respondents' property is thus not inconsistent with the local law governing a landowner's claim to the immediate reaches of the superadjacent airspace.

"The airplane is part of the modern environment of life, and the inconveniences which is causes are normally not compensable under the Fifth Amendment. The airspace, apart from the immediate reaches above the land, is part of the public domain. We need not determine at this time what those precise limits are. Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land. We need not speculate on that phase of the present case. For the findings of the Court of Claims plainly establish that there was a diminution in value of the property, and that the frequent low-level flights were the direct and immediate cause. We agree with the Court of Claims that a servitude has been iinposed upon the land."

Causby has been cited with approval many times by subsequent cases.

In *Causby,* the Court was concerned with the nature of the plaintiffs' interest in the property and the extent to which governmental action interfered with that interest. Substance and not mere form was controlling. The owners'

right to possess and exploit the land and other incidents of his beneficial ownership had been destroyed. It was the character of the invasion that was determinative. If the damage or interference with the use of the property is "substantial" and "direct and immediate," that determines whether there has been a taking.

In Virginia we have no Tort Claims Act waiving sovereign immunity, but Section 58 of the Constitution provides that the General Assembly "shall not enact any law whereby private property shall be taken or damaged for public uses, without just compensation. . . ." Under this provision, our State Supreme Court has held that the right of recovery under Section 58 of the Constitution of compensation for damage done to property by an agency clothed with the power of eminent domain in effecting a public improvement is not predicated upon proof of negligence but the purpose of the constitutional provision is to guarantee to an owner just compensation both where his property is taken for public uses and where it is damaged for public uses, irrespective of whether there be negligence in the taking or the damage. *Heldt* v. *Elizabeth River Tunnel District,* 196 Va. 477, 84 S.E.2d 511.

See *Portsmouth* v. *United States,* 260 U.S. 327, 43 S.Ct. 135, where the claimants asserted a taking of the property by the Government due to the erection of a fort, the guns of which had a range over the whole sea front of the claimants' property.

It should be irrelevant whether or not a claim brought for a "taking" in violation of the Fifth Amendment sounds in tort. The basis for such suits should be neither tort nor contract but rather a separate cause of action created expressly to carry out the principle embodied in the Fifth Amendment. See *United States* v. *Dickinson,* 331 U.S. 745, 748.

In *United States* v. *Gravelle,* 407 F.2d 964, 968, the Government undertook an extensive series of supersonic flights over Oklahoma City for the purpose of determining what, if any, damage would result to property and persons from sonic booms, and homeowners established that their homes did in fact sustain damage. The Court termed the test a deliberate tort for which the government would be held liable under the Tort Claims Act.

The Court of Appeals said on this subject:

> "Nelms also claims that he has a constitutional right to recovery because his property has been taken without just compensation. Nelms did not press his constitutional claim in the district court, though his complaint, broadly read, is sufficient to embrace it. The district judge understandably dealt only with Nelms' cause of action under the Federal Tort Claims Act. Nelms' pleading and proof present a record too sketchy for initial consideration of this important constitutional question in an appellate court.
>
> "The summary judgment entered by the district court is vacated, and this case is remanded for trial. With regard to the cause of action based on the Federal Tort Claims Act, the sole issue to be tried is whether sonic booms damaged Nelms' home, and, if so, the extent of the damage. Nelms also should be allowed to amend his complaint to plead more specifically his cause of action based on the Fifth Amendment. On this issue, Nelms must establish that the damage, if any, to his home amounted to a taking of his property without just compensation." (442 F.2d at page 1169)

So, in conclusion, the case should be remanded to the trial court to be tried either under the Tort Claims Act or under the Fifth Amendment to the Constitution or under both.

CONCLUSION

We respectfully submit, with deference and yet with a firm conviction, that the activity involved in this case comes within the classification of ultrahazardous activities, particularly in view of the local law, Air Force Regulation 55-34, and the requirement of the Federal Tort Claims Act that the case be determined according to local law; that the pilots flying supersonic flights were under a mandatory duty to comply with the local law and Air Force Regulation 55-34, having no discretion to do otherwise; that the *Dalehite* case is not analogous to this case and does not in any way control the decision of the court in this case because the explosion was a mere unforeseeable accident; that in any event, the case must be remanded for trial either under the Federal Tort Claims Act or the Fifth Amendment, or both.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Geo. E. Allen, attorney for respondents, hereby certify that service of the foregoing Brief for Respondents was had by mailing four copies, postage prepaid, to the Honorable Erwin N. Griswold, Solicitor General of the United States, U.S. Department of Justice, Washington, D.C. 20538, on the 29th day of March, 1972.

GEO. E. ALLEN